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18 McKinley Ct. - GDI

Inn at Diamond Cove

Inn at Diamond Cove, LLC.

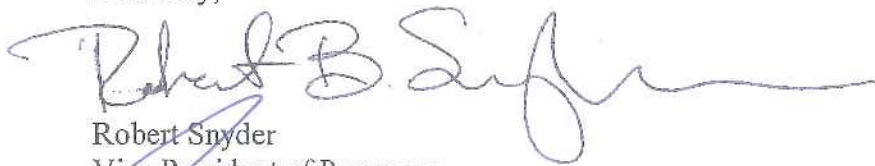
on Spreadsheet

The Island Institute is concerned that the proposed redevelopment will seriously undermine these aspects of island life that have come to define the unique nature of Great Diamond Island. Increased traffic, added stress on waste water and hard waste facilities, and the lost sense of security that inevitably comes with having a far more transient habitation patterns... all of these issues are echoed by Great Diamond Island residents. Underlying these concerns are very real questions about how the true number of residences and the length of stay in these places will be managed. Based on these and other concerns, and our responsibility to uphold the land use ordinances established in the 1990s, the Island Institute is here to echo the concerns of island residents and to support them in their efforts to track this process.

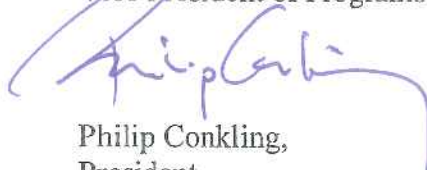
We look forward to continuing to discuss these issues with island residents and the City of Portland as this process moves forward to ensure that the intent and letter of the land use covenants is upheld.

Thank you for your time.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert B. Snyder", with a long horizontal flourish extending to the right.

Robert Snyder
Vice President of Programs

A handwritten signature in blue ink, appearing to read "Philip Conkling", with a long horizontal flourish extending to the right.

Philip Conkling,
President

STATEMENT DISTRIBUTED BY
JIM KATSIAFICAS

5. Transportation Services. The Owner/Manager of the Premises [who is the "Owner/Manager of the Premises"? – term is undefined] shall use its best efforts to secure from the Casco Bay Island Transit District year-round common carrier water transportation service to, from and between the Portland waterfront and the Diamond Cove Pier (or barge landing where appropriate for passengers and/or cargo) on a schedule to be established by the carrier based upon passenger demand; provided, however, that in the event that such service becomes unavailable, the Owner/Manager shall provide an equivalent alternative to such service, subject only to the approval thereof by the Public Utilities Commission, or such other regulatory authority having jurisdiction thereof. The Owner/Manager shall also provide suitable ground transportation from points of disembarkment within the Project to the hotelminiums. The Owner/Manager shall not provide motorized ground transportation off the Ft. McKinley Project site. The Owner/Manager, its employees, and hotelminium unit owners and their tenants, lessees, guests, and invitees shall use no motorized ground transportation of any kind to travel from the Fort McKinley Project Site to the pier at the south end of the Island except in the event of emergency. And Subject to the specific restrictions set forth above, -all such transportation shall also strictly conform to all existing ordinances, rules and regulations concerning travel outside of the Project site to the public pier at the southerly end of Great Diamond Island. The Owner/Manager of the Premises shall conspicuously post, and keep posted, in each All purchasers of hotelminium units at the Premises a written notice of the applicable ordinances, rules and regulations including the potential sanctions for failure to comply, which "applicable ordinances, rules and regulations" shall consist of the "Amendment to Portland City Code Section 14-49 Re: Conditional Rezoning of Fort McKinley," enacted July 15, 1985 by Order 42-84/85; the "Conditions and Restrictions" set forth in Order 42-84/85; the "Amendment to Conditional Zone Agreement Referenced in Order 42-84/85," enacted August 16, 2004 by Order 33-04/05; the "Conditions Restricting Use of Diamond Cove Motor Vehicles Outside of Diamond Cove" referenced in Order 33-04/05, when and as accepted by the City's Planning Authority; and these "Supplemental Conditions and Restrictions." Moreover, the City shall have no obligation to provide mainland parking for any owner, occupant, guest or invitee of any hotelminium unit or any manager or on-site staff thereof.

David Clem
10 Parkway
Hanover, New Hampshire
03755

June 27, 2008

Rick Knowland
Senior Planner
Planning Division, 4th Floor
389 Congress Street
Portland, ME 04101

Re: The Inn at Diamond Cove

Dear Mr. Knowland:

I am writing to oppose that portion of the proposal by The Inn at Diamond Cove to amend the IR-3 conditional zone for Fort McKinley to allow hotel condominiums in the Hospital building. I am not opposed to the request to convert the Double Barracks building to hotel condominiums. The character of the parade ground is distinctly different and the infrastructure more in keeping with the more intensive use.

I am the owner of Lot 22, The Pump House, which is one lot removed from the Hospital.

Sincerely,



David Clem

August 28, 2008

Hand Delivery

Portland City Council
City of Portland
389 Congress Street
Portland, ME 04101

Re: The Inn at Diamond Cove LLC, Double Barracks and Hospital Buildings,
Application for Amendment to Conditional Zoning Agreement

Dear Mayor Suslovic and City Councilors:

This Firm represents the Diamond Island Association (DIA), a Maine corporation whose members are residents of the cottage community on the south side of Great Diamond Island -- a community that has been in existence since the 1880s.

Introduction.

DIA and its members are concerned about the adverse impacts the proposed Inn at Diamond Cove LLC development (the Inn) could have on their road system, environment and culture. Any motorized vehicle traffic that passes from the current Diamond Cove/Fort McKinley development to the southerly ferry pier must proceed past residences and over a very narrow isthmus on Nancy Lane, a gravel road, to the State pier. Motorized vehicle traffic from the current Diamond Cove/Fort McKinley development to the southerly ferry pier includes several trips per day by Diamond Cove Homeowners Association (DCHA) vehicles, including two 20-seat vehicles that are the equivalent in size of airport shuttle buses, pickup trucks and panel vans. Their use of this road already has caused ruts and potholes on Nancy Lane. Without appropriate conditions and restrictions, additional traffic from the proposed Inn will only worsen this situation. DIA's members also are concerned about a zoning text amendment that would allow the Inn -- a commercial "hotelminium" -- in an Island Residential 3 (IR-3) zoning district, and that the Inn's additional units will overtax existing septic system.

DIA has taken a formal position regarding the traffic impacts of the proposed Inn, which if unregulated, will increase the numbers of persons and the amount of goods being transported to and from the State pier at the southerly end of Great Diamond Island, and could add more motorized vehicles. DIA's Board of Directors has unanimously voted not to oppose this conditional zoning amendment application if the City of Portland and the Applicant, the Inn at Diamond Cove LLC, satisfactorily address these traffic impacts. However, DIA's Board of Directors also has unanimously voted that if the traffic impacts of the proposed Inn are not satisfactorily

DOUGLAS B. CARR
PHILIP C. HUNT
JONATHAN S. LUDWIG
REGGIE L. MOSELEY
MELISSA HANCOCK MURPHY
JOHN A. O'RAHILLY
JOHN A. HOBSON
JAMES H. KATSAKIS
THOMAS P. BENOIT
J. GORDON SCANNELL, JR.
FRED W. BOFFILL
MARK P. SNOW
WILLIAM SHEELS
DAVID B. MCCONNELL
PAUL D. PETROFACCI
MICHAEL JACOBSEN
RANDY J. CRESWELL
JENNIFER H. BENCUS
DAWN M. HARMON
CHRISTOPHER M. BARGH
ANTHONY J. MANIART
STEPHANIE A. WILLIAMS
PETER J. MC DONELL
LAUREN H. EPSTEIN
KEITH L. DUNN AP
GWYNETH W. OLICOTT

OF COUNSEL

THOMAS SCHULTEN
OWEN W. WELLS
ANDREW A. CAHILL
JULIANNE C. RAY
CATHERINE O'CONNOR

addressed, then DIA opposes this conditional zoning amendment application. (In either event, DIA will carefully review the site plan application for the proposed Inn when that is submitted.)

DIA requested the Planning Board to include specific transportation-related restrictions on the proposed Inn in its recommendation to the City Council, but it declined to do so. While the Planning Board recommendation does address the issue of transportation from the proposed Inn to the State pier at the southerly end of the Island by incorporating some of the Applicant's own representations on this point, it does not go far enough to address DIA's concerns, which are:

1. That the proposed Inn not increase the amount of or add any new motorized traffic from the Diamond Cove site to the Great Diamond Island pier at the southerly end of the Island;
2. That the Inn's unit owners, renters, guests, invitees, workers, staff and other users and occupants of and visitors to the Inn and its Double Barracks and Hospital Buildings are made aware of the specific ordinances, conditions, rules and regulations that govern ferry transportation between the Diamond Cove site and the Portland waterfront and that govern motorized vehicle transportation on the Island; and
3. That the City actively enforce its ordinances, conditions, rules and regulations that govern ferry transportation between the Diamond Cove site and the Portland waterfront and that govern the operation of motorized vehicles on the Island.

Section 14-62 of the Portland City Code specifically authorizes the City Council to impose conditions and restrictions that "relate to the physical development and operation of the property" as part of the conditional zoning process that is central to application of the IR-3 Zone. Therefore, the City Council used conditional zoning under Sections 14-60 through 14-63 to rezone the Diamond Cove property on Great Diamond Island to permit the original Diamond Cove/Fort McKinley development, and the Applicant is seeking to have that conditional rezoning amended to permit the currently proposed additional development. For reasons that follow, DIA urges the City Council to add conditions and restrictions relating "to the physical development and operation" of the proposed Inn as part of this proposed amendment to the Diamond Cove IR-3 conditional zoning to ensure that the zoning amendment addresses DIA's traffic concerns and that the proposed Inn poses no additional harm to the Island community.

Need for Traffic Conditions and Restrictions on Proposed Development.

It is particularly appropriate and necessary in light of the history of development on Diamond Cove since the 1980s that the City Council impose conditions and restrictions regarding the transportation issues raised by the proposed Inn in this IR-3 conditional zoning amendment. As City of Portland Senior Planner Richard Knowland, who has worked on this project for more than two decades, notes at page 5 of the Aug. 6, 2008 Planning Board Report to the City Council:

Transportation is a sensitive issue on Great Diamond Island particularly on the southerly (or public) side of the Island. Private automobiles are not permitted within the IR-3 conditional zone. As the Board may recall in 2004, the Diamond Cove Homeowners Assoc. requested an amendment to the conditional zone to allow golf carts/electric vehicles. A zoning amendment was passed but with enforcement provisions to ensure that non-service vehicles don't cross the property line into the southerly end of the Island.

The following transportation restrictions already apply to the existing Diamond Cove/Fort McKinley development:

- **City of Portland (1985).** When the City approved the IR-3 conditional zoning for the Diamond Cove/Fort McKinley development in 1985, it adopted conditions and restrictions requiring the owner (Diamond Cove Associates, or "DCA") to provide a separate ferry pier, and restricted motor vehicle use on the Diamond Cove/Fort McKinley Premises to vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers, and fire protection, public safety and emergency vehicles.¹
- **Department of Environmental Protection (Phase I - 1986).** Maine Department of Environmental Protection (DEP) approval for Phase I of the Diamond Cove/Fort McKinley site (134 condominium units approved in the former military buildings, 77 units built to date) included similar provisions to direct water transportation away from the southerly State pier and to prevent motorized vehicles from driving outside of the Diamond Cove/Fort McKinley development over the southern part of the Island.²
- **Private Agreement (1989).** Opposition to a waste water discharge permit for the Diamond Cove development was settled through a March 2, 1989 agreement among DCA, Maine Audubon Society, Conservation Law Foundation and Island Institute, in which DCA agreed that:

No motor vehicles of any kind (automobiles, golf carts, snowmobiles, ATV's etc.) shall pass from the DCA property to the southern part of the Island. The

¹ In particular, Paragraph 8 of the City's 1985 Conditional Rezoning of Fort McKinley directed DCA to "use its best efforts to secure from the Casco Bay Island Transit District year-round common carrier water transportation service to, from and between the Portland waterfront and Diamond Cove via a suitable docking facility on the Premises and on a schedule to be established by the carrier based upon passenger demand;" or else to provide at its own expense an equivalent alternative to such service. Paragraph 9 of the City's 1985 Conditional Rezoning prohibited the operation or storage, temporarily or otherwise, on the Diamond Cove premises of any motor vehicles "Except for vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers, and fire protection, public safety and emergency vehicles."

² See DEP Site Location of Development Order dated Dec. 10, 1986, section 11, "Transportation" (noting in paragraph A the City's general prohibition on the operation and storage of motorized vehicles, and in paragraph B, that the central pier in Diamond Cove would be rebuilt "to facilitate access to the site by the Casco Bay Island Transit District's (CBITD) ferries and by private boats" and that no parking facilities exist at the southerly ferry pier but that parking would be provided at Diamond Cove).

only exception shall be fire equipment, ambulances and designated 'taxi' (shuttle vans) which might transport persons from the Fort McKinley property to the pier at the southern end of the Island. All construction vehicles, equipment and materials must be landed and off-loaded or loaded on DCA property. To the extent that this condition is not already a part of the Site Location Order -- paragraph 11 -- DCA will seek an amendment to reflect this limitation.

A March 10, 1989 amendment changed the designated "taxi" from "shuttle vans" to "vans."

- **DEP (Phase II – 1991).** DEP approval for Phase II (39 house lots approved, 34 built) of the Diamond Cove/Fort McKinley development included provisions to authorize certain motorized vehicles in that development and to restrict their operation to the development site, and to recognize that CBITD had agreed to provide ferry service to the Diamond Cove pier.³

- **City of Portland Amendment (2004).** The City Council amended the IR-3 Conditional Zoning Agreement for Diamond Cove in 2004 to address complaints and issues over the use of motorized vehicles, including golf carts and shuttle vehicles, within and outside of the Diamond Cove/Fort McKinley site and to the southerly ferry pier. Part of that amendment required the DCHA to file a transportation management plan with the City's Planning Authority within 60 days of approval of the amendment by the City Council. That plan in part would include "a restriction that confines permitted vehicles to established roadways that are presently within the DCHA property;" and "a description of available common transportation service vehicles and how they will be managed for the needs of residents and visitors." The City Council passed the amendment on August 16, 2004; while DCHA submitted a Diamond Cove Traffic Management Plan, the City's Planning Authority did not find it acceptable to satisfy this requirement. Therefore, the previous amendment to the IR-3 conditional zoning has yet to be implemented, and now the Applicant is before the City Council for still further amendment.

Comments on Planning Board Recommendation.

David Bateman, on behalf of the Applicant, stated orally at a Planning Board workshop that Inn would not use the southerly pier to travel to and from the Island,⁴ but apparently the Applicant

³ See DEP Site Location of Development Order, June 25, 1991, section 7, "Traffic Movement/Roadways" (noting in paragraph A, that "Each lot owner will have the right to own and operate one golf cart within the project site," that the City generally prohibits the operation and storage of motorized vehicles within the project site (except emergency vehicles) and that DCHA intends to "operate a shuttle-type transportation system on an as-needed, on-call basis to serve residents and guests," and in paragraph B, that CBITD had agreed to provide scheduled ferry service to the rebuilt Diamond Cove pier.

⁴ DIA member Nancy Gleason provides this transcription of the relevant portion of the April 22, 2008 Planning Board Workshop recording:

David Bateman: "If I could add just one thing because I – over the years I've gained, I think, a lot of respect for not only the attitudes, but the lifestyle ah that was there before I ever set foot on Great Diamond Island. And so that no one here has one more sleepless night even thinking about it um I gave it a lot of thought in ever becoming involved

does not wish to put this in writing. Given the long history of transportation issues with regard to the existing Diamond Cove/Fort McKinley development, DIA members were heartened to see City Planning Staff initially recommend to the Planning Board a revision to the Applicant's proposed amendment which would put this in writing. It: 1) required the owner of the Inn and its successors, heirs and assigns to provide water transportation to and from the Diamond Cove pier to all persons, including owners, guests, staff, suppliers and others at the Double Barracks and Hospital Building hotelminium, and 2) provided that no occupant of the Double Barracks or Hospital building shall be permitted to utilize water transportation from the southern side of the Island unless the occupant walks to and from the southern pier. DIA believed that these requirements, with relatively minor changes, could adequately protect all Island residents.

However, the Applicant then presented a separate "Supplemental Conditions and Restrictions" which became the focus of the Planning Board public hearing. At that public hearing, DIA presented a set of changes to the Applicant's Supplemental Conditions and Restrictions to address the three concerns we previously listed. These changes: 1) prohibited the unit owner/manager, its employees, and hotelminium unit owners and their tenants, lessees, guests, and invitees from using motorized ground transportation of any kind to travel from the Fort McKinley Project Site to the pier at the south end of the Island except in the event of emergency; and 2) required each unit owner/manager to conspicuously post, and keep posted, in each hotelminium unit a written notice of the specific applicable ordinances, rules and regulations, including the potential sanctions for failure to comply. Applicant's attorney opposed the DIA changes because Inn hotelminium unit owners also would be members of DCHA, and it would be difficult for DCHA to distinguish between the existing Diamond Cove/Fort McKinley development owners, users, guests and employees who could take the shuttle bus service to the southerly pier, and Inn hotelminium owners, users, guests and employees who could not. DIA pointed out to the Planning Board the contradiction between Atty. Ward's new position and the Applicant's own earlier representation in its April 29, 2008 memorandum to the Planning Board:

in Diamond Cove again. And it is true over the last 11 years, the things that I stood for, the things I held to a point of absolute law have been degraded and I apologize for that, but there is nothing I can do and I fought tooth and nail and spent over 1/2 million dollars of my own money to right those things. Don't ask me to do that. But the fact of the matter is I have a commitment to do exactly what I started over 20 years ago. And one of the big things that was a flash point is that transportation and the abuse of the Southern end. And I think everybody here remembers that fact that that was one thing I wouldn't tolerate. Now I don't control Diamond Cove anymore, but I can - and that's one of the reasons that I want to make sure that the transportation issue was under my control for what I do, because quite frankly that's the only thing I can guarantee and I will guarantee you this: I have no intention and frankly no use; it's just not a great spot. The pier on the Southern end quite frankly just doesn't work for us - doesn't work at any level whether it is service, whether it's our guests and I wish (it were different?). I think it works very good for you folks, but quite frankly, just doesn't work (under this scheme?)."

Planning Board Member Lee Lowry then asks Mr. Bateman to "define" all of this in writing.

Mr. Bateman: " Absolutely. I really wanted to say that more for everyone here in this room. Because that anxiety is something you may have other concerns... (garbled).but don't (that's the least?) of our direction." (garbled) under any circumstances, just doesn't work for us."

Following construction, all of the owners, guests and employees will be directed to the same landing points [Diamond Cove pier and the barge landing] utilizing the same services [Casco Bay Lines and private water shuttles] and specifically advised not to utilize any off-site facilities, including the public pier at the south end of the Island. Over time, it is possible that the Project will collaborate on certain transportation but the Project will not be collaborating on any transportation which exits the Fort McKinley site.

While the Planning Board was unwilling to recommend further restrictions on motor vehicle operation, believing these are better suited to later site plan review, it **did** add the first sentence from the Applicant's representation quoted above to its recommendation. DIA thus acknowledges that the Planning Board recognized the issue, but does not believe that its recommendation adequately protects DIA members from the adverse transportation impacts presented by the Inn's application for amendment to the IR-3 conditional zoning.

Therefore, enclosed please find DIA's requested revision to the Planning Board's recommended "Supplemental Conditions and Restrictions" which we believe is necessary to address DIA's transportation concerns.

Conclusion.

There is a history of more than 20 years of regulation of the existing Diamond Cove/Fort McKinley development to prohibit motor vehicles, except for emergency vehicles and approved vans, from using the south State pier. This limitation is explicit and is written. The Applicant has orally expressed at Planning Board workshops on the proposed Inn that it will not use the south pier for residents, guests, invitees, construction workers and other workers for the proposed Inn and its hotelminium units. DIA is asking is that these oral representations be placed in writing. DIA does not want the southerly pier on Great Diamond Island and the road through the southerly end of the Island to be the service entrance to Diamond Cove and to the proposed Inn, to the detriment of those who reside on the southerly part of the Island.

Therefore, DIA urges the City Council, if it is to pass an IR-3 conditional zoning ordinance amendment, to adopt the enclosed language in order to protect the southerly part of the Island from adverse transportation impacts of the proposed Inn. DIA also urges the City Council to require DCHA to meet with DIA and other stakeholders to agree upon and file an acceptable Diamond Cove Traffic Management Plan with the City so that the intent of the previous 2004 City Council amendments to the IR-3 rezoning plan for the existing Diamond Cove/Fort McKinley development can be realized. The DIA seeks nothing more than: (1) transportation conditions and restrictions that preserve a way of life that has been enjoyed on the southerly part of Great Diamond Island since the 1880s; (2) communication of these conditions and restrictions to owners, users, guests and invitees of the proposed Inn; and (3) strict City enforcement of these conditions and restrictions to preserve the Island's quality of life.

The Honorable Edward Suslovic
Portland City Council
August 28, 2008
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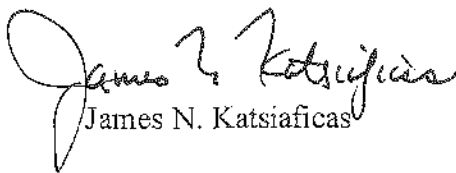
If, however, the City Council does not incorporate language that is identical or similar to the enclosed as part of the IR-3 conditional zoning ordinance amendment, so that the amendment fails to address DIA's transportation concerns, then DIA will have no choice but to contest the validity of this conditional zoning ordinance amendment. State law (30-A M.R.S.A. §4352(2)) requires a zoning ordinance to be pursuant to and consistent with a comprehensive plan. Portland's Comprehensive Plan, referencing the Portland Islands Land Use and Zoning Study - 1985, states under "Portland Island Policies" that "The City should adopt a policy for future development that minimizes the dependency on and intrusion of private automobiles in the islands." Chapter 14, Section 145 of the Portland Code implements that policy and sets forth the following criteria for rezoning to IR-3 and for any development within the IR-3 Zone:

- "IR-3 zones should not be established unless issues of municipal services, including infrastructure...and police and fire services and other municipal services can be appropriately and adequately addressed." Section 14-145(13)(c).
- "The project shall be designed primarily with a pedestrian orientation to minimize the use of and dependency on private motor vehicles." Section 14-145.16(a).

Any amendment to the IR-3 conditional zoning of the Diamond Cove property to accommodate the proposed Inn that does not appropriately and adequately address the use of Island roads and that does not protect the primarily pedestrian orientation of the Island and minimize the use of motorized vehicles is neither consistent with Section 145 nor consistent with Portland's Comprehensive Plan, and is subject to a successful challenge because of that inconsistency.

Thank you for your consideration.

Sincerely,


James N. Katsiaficas

JNK:pal

cc: Joseph E. Gray, City Manager
Penny Littell, Director of Planning and Development
Richard Knowland, Senior Planner
Ronald N. Ward, Esq.
Jennifer Burns Gray, Esq., Maine Audubon Society
Casco Bay Island Development Association
Sean Mahoney, Esq., Conservation Law Foundation
Philip Conkling, President, Island Institute
Joseph E. Payne, Casco BAYKEEPER, Friends of Casco Bay
Diamond Island Association

The Honorable Edward Suslovic
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cc: Gary C. Wood, Esq.
Corporate Counsel

(DCA Revision)

**SUPPLEMENTAL CONDITIONS AND RESTRICTIONS
BUILDINGS 46 ("DOUBLE BARRACKS") AND 19 ("HOSPITAL")
FT. MCKINLEY, PORTLAND, MAINE
SEPTEMBER 3, 2008**

The following supplemental conditions and restrictions are imposed by the City of Portland (the "City") on that portion of the Ft. McKinley project ("Project") commonly known as Buildings 46 and 19, together with the ancillary service area, all as depicted on the map attached hereto as Attachment 1 ("Premises"), as conditions of the rezoning of the Premises at the request of The Inn At Diamond Cove, LLC ("IDC")¹, and consented to by the Diamond Cove Homeowners Association ("DCHA"):

1. Existing Conditions. The Premises are a portion of the development commonly known as Ft. McKinley, Great Diamond Island, Portland, Maine which is subject, *inter alia*, to those Conditions and Restrictions recorded in the Cumberland County Registry of Deeds in Book 8928, Page 263, as amended by Order of the Portland City Council on August 16, 2004 relating to ground transportation in and around the Project (collectively, the "Existing Conditions and Restrictions").

2. Supplemental Conditions and Restrictions. Notwithstanding the terms of the IR-3 zoning text otherwise applicable to the Premises, and the Existing Conditions and Restrictions, those buildings designated as Building 19 ("Hospital") and Building 46 ("Double Barracks"), the immediate grounds attendant thereto and a portion of the Open Space, all depicted on the site plans dated June 24, 2008 [consisting of four (4) sheets and attached hereto as Attachment 2], all may be redeveloped into individually owned and fully equipped condominium units, sometimes known as "hotelminiums" and a supporting pool/services area on the Open Space. "Hotelminium" is defined as privately owned residential condominium units (with kitchens) located within a structure that offers reasonable and customary on-site hotel services² which are limited to the unit owners, their guests, tenants in residence and members of the DCHA. The Hotelminium units may be rented (in whole or in part by virtue of attached bedrooms capable of being independently rented through a "lock out" system from the remainder of the unit) for varying durations to the general public through a centralized hospitality vendor. The Double Barracks may include up to a maximum of twenty (20) hotelminium units [with the maximum number of lock out units, included as part of the twenty hotelminiums and not separate units, not to exceed sixteen (16)] and the Hospital may include up to a maximum of twelve (12) hotelminium units [with the maximum number of lock out units, included as part of the twelve hotelminiums and not separate units, not to exceed twelve

¹ For purposes of this Supplemental Conditions and Restrictions document, "Owner/Manager" referred to herein shall mean, individuals and collectively, the following: IDC, its successors in interest or assigns; individual unit owners, ~~there~~ their heirs, successors in interest and assigns; any and all management company retained by or working on behalf of IDC, its successors or assigns and/or individual units owners and their heirs, successors in interest or assigns.

² For purposes of this Supplemental Conditions and Restrictions document, "reasonable and customary on-site hotel services" shall include but not be limited to laundry service, linen service, room service, health and fitness facilities, food and beverage service, concierge, etc.

(12)]. The units contained within the Double Barracks and the Hospital buildings shall become members of a separate condominium association established for these two rehabilitated buildings, and each unit will also be considered a "lot" within DCHA, subject to all of the applicable restrictions, covenants, conditions, assessments and the like of both DCHA and the newly-established condominium association.

The Double Barracks and the Hospital, both of which may be renovated, are depicted on Attachment 2. The allowable rehabilitation of these buildings may include construction of a new swimming pool and related guest services building on that portion of the Open Space depicted on the site plans, a copy of the relevant portion of which appears as Attachment 2 hereto. The recording of this Amendment shall be deemed to supplement the Conditions and Restrictions recorded in Book 8928, Page 263 and the "Dedicated Open Space Plan" attached thereto as an Exhibit.

3. Disposal of Solid Waste. All solid waste generated on the Premises shall be collected and disposed of privately, on the mainland, with temporary storage of such waste being handled within the building and disposed of in accordance with all applicable regulations, codes and laws; or if, in the City's opinion, it would not create an unreasonable burden thereon, at a municipally-operated island solid waste disposal facility.

4. Fire Protection. The Double Barracks and Hospital buildings shall be fully sprinkled and have installed, and at all times functional, a central fire alarm system operative prior to the issuance of any certificate of occupancy for the respective building.

5. Transportation Services. The Owner/Manager of the Premises shall use its best efforts to secure from the Casco Bay Island Transit District year-round common carrier water transportation service to, from and between the Portland waterfront and the Diamond Cove Pier (or barge landing where appropriate for passengers and/or cargo) on a schedule to be established by the carrier based upon passenger demand; provided, however, that in the event that such service becomes unavailable, the Owner/Manager shall, at its own expense, provide an equivalent alternative to such service, subject only to the approval thereof by the Public Utilities Commission, or such other regulatory authority having jurisdiction thereof. The Owner/Manager shall also provide suitable ground transportation from points of disembarkment within the Project to the hotelminiums. The Owner/Manager shall not provide motorized ground transportation off the Ft. McKinley Project site and the Owner/Manager, its guests, tenants, invitees and employees shall not use motorized ground transportation of any kind to travel off the Ft. McKinley Project site to the pier at the south end of the island except in the event of emergency. all such transportation shall strictly conform to all existing ordinances, rules and regulations concerning travel outside of the Project site to the public pier at the southerly end of Great Diamond Island. All Premises owners, guests and employees will be directed to utilize Casco Bay Lines or private water shuttles arriving at the Diamond Cove landing point or the barge landing point (at the north end of Great Diamond Island) and will be specifically advised not to utilize any off-site facilities, including the pier at the south end of the island. The Owner Manager shall conspicuously post, and keep

30-40' from
former A-manchi's
house
2163 to Tolson house
Bill Robeck
owns
Walters Park
middle of
portion
of island roadway
system.

owner?

7-1 (Skolark...)

7-1 Skolark
in

operate

enforcement actions not before council.

posted. All purchasers of in each hotelminium units at the Premises, shall receive specific a written notice of the applicable ordinances, rules and regulations, including the potential sanctions for failure to comply, which "applicable ordinances, rules and regulations" shall consist of the "Amendment to Portland City Code Section 14-49 Re: Conditional Rezoning of Fort McKinley," enacted July 15, 1985 by Order 42-84/85, including the "Conditions and Restrictions" set forth in Order 42-84/85; the "Amendment to Conditional Zone Agreement Referenced in Order 42-84/85," enacted August 16, 2004 by Order 33-04/05, including the "Conditions Restricting Use of Diamond Cove Motor Vehicles Outside of Diamond Cove" referenced in Order 33-04/05, and the transportation management plan referenced in Order 33-04/05 when and as accepted by the City's Planning Authority; and these "Supplemental Conditions and Restrictions."; Moreover, the City shall have no obligation to provide mainland parking for any owner, occupant, guest or invitee of any hotelminium unit or any manager or on-site staff thereof.

6. Disposal of Sanitary Waste. The IDC is obligated hereunder to involve the City in all aspects of its sanitation waste licensing, and any modifications thereto, with any local, state or federal agency. This includes providing the City with copies of all information submitted to said agencies and involving the City in all meetings and discussions concerning sanitary waste disposal. No site plan or subdivision application shall be approved by the City unless and until documentation of Maine DEP approval of the sanitary waste system serving the Premises is provided.

7. Interpretation: Conflicts. The within conditions and restrictions are intended to supplement the existing Conditions and Restrictions and amendments thereto, all of which shall remain in full force and effect except as modified herein or as may be modified by further amendment or ordinance duly enacted by the City of Portland. In the event of any conflict between these Supplemental Conditions and Restrictions and the pre-existing Conditions and Restrictions, as amended, these Supplemental Conditions and Restrictions shall control.



FACSIMILE MESSAGE

To: Bateman Partners LLC	Fax: 207-772-1881
cc: Portland Planning Board and Richard Knowland	Fax: 207-756-8258
From: Barbara A. Young	Date: May 20, 2008
Client No. 00000-011	No. Pages: 1
Re: Conditional Zoning Amendment Proposed by The Inn at Diamond Cove LLC	

Remarks:

I understand that a "Neighborhood Meeting" is being held today regarding the above referenced proposal. Please note the following:

1. As a Parade Ground homeowner at Diamond Cove, we never received notice of this meeting, as I believe is required under the Planning Board's regulations. Having just learned of it from a neighbor, I am unable to arrange my schedule at the last minute to attend. Given the deficiencies in the notification, others may similarly not have received notification.
2. I have substantial concerns about this zoning amendment as currently proposed, including as to wastewater treatment, traffic, use of open space, and the commercialization of the residential Parade Ground area.

Please include the above in the minutes and attendance sheet of the "Neighborhood Meeting" to be submitted to the Portland Planning Board.

Thank you.

Barbara A. Young
16D McKinley Court
Great Diamond Island

330 Harbor Road
Southport, Connecticut 06890

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**QUESTIONS AND ISSUES THAT NEED TO BE ADDRESSED
BY STAFF IN RESPONSE TO INQUIRIES FROM THE COUNCIL
ON THE GREAT DIAMOND COVE HOTELMINIUM PROJECT**

Email To: Penny Littell, Alex Jaegerman, Rick Knowland, Fred LaMontaigne, Joe Loughlin, Ron Ward at Drummond Woodsum, Tony Calcagni at Verrill Dana

Re: Council inquiries or request for information for the October 6th Council meeting regarding Diamond Cove Hotelminium project

I Councilor Mavodones

(1) What is the actual current available capacity at the waste treatment plant inside the Cove (Planning)

(2) Are the restrictions currently contained in the proposed amendments sufficient to ensure that vehicular traffic won't cross the island from the Cove to the public landing? (Planning) NB: Jim Katsiaficas has proposed more exacting restrictions that are attached to his letter.

a. Does the developer support or oppose the restrictions as drafted in the proposed amendment? (Ron Ward)

In general, several councilors questioned whether the traffic restriction language in the current proposal is actually sufficient to be binding in a meaningful way on property owners within the Cove and those who will be using the hotelminium.

(3) What will be the impact of the hotelminium on City services: DPS, PFD and PPD? (question posed by several councilors) (Mike Bobinsky, Fred Lamontaigne, Joe Loughlin)

Put another way, would the City need to increase its level of any of the above services if the hotelminium is approved?

(4) Does this proposed amendment constitute spot zoning or is it a conditional zoning amendment that is consistent with the Comprehensive Plan (Site language) and legally defensible? (Penny Littell)

(5) What is the current rental program within Diamond Cove for the existing units? (Attorney Tony Calcagni at Verrill Dana)

(6) Would the proposed bar be allowed under DEP regulations and by the applicable zoning as a permitted use? (Planning)

(7) Is the proposal to eliminate some of the ROS space illegal under the current controls and regulations governing uses and zoning within the Cove? NB Tony Calcagni answered this question: the ROS issue raised by those objecting to the project is not applicable to Phase 1 of the Diamond Cove development, which is the phase that we are still in. The language cited by opponents in 7.3.2 of the declarations in which it is stated that land in an ROS classification shall remain in that classification forever is only applicable to phase 2 of the proposed development.

Can Planning confirm that he is correct that this is phase 1 of the development, and what makes that so?

(8) What is the impact of the lawsuit that was just filed on the action being asked of the Council? (GCW)

(9) What was Joe's authority for casting the City's votes in the condo association vote to approve the project? (GCW)

Mary P: Please search or ask Mary C. about this issue because I believe that she spotted it and we actually drafted an order that we sent to the Council for approval that authorized him to cast these votes. If not, she may remember what we did to decide that Joe could cast the votes and it may be reflected somewhere in the file.

II. Councilor Anton

(10) What is the City's obligation to enforce or comply with third party agreements between the developer and other organizations such as DEP and the Conservation Law Foundation? (GCW)

Answer: none.

(11) How have we defined for the purposes of this application the terms "residential hotel condominium"?

What is the difference between an apartment, a condo, a residential hotel condominium and a hotel under our current ordinance scheme? Are they rationally definitionally different?

(12) What is the Council's legal ability to impose legal restrictions on someone's right to rent their property? (GCW)

(13) What is staff's response to the allegations by opponents to the project that people already are not living up to or being held accountable for living up to existing conditions and restrictions that have been in place for years?

(14) What are those issues that staff concludes are more properly focused on as part of a site plan application before the planning board?

NB: I believe Rick Knowland's memo already answers this question specifically.

III Councilor Lecman

(15) What is the specific role being asked of the Council in this case? (GCW)

(16) In relation to this application, does this application still have sufficient right title and interest for this matter to be before the Council?

NB: The backup documents do not contain what I believe is the latest extension of our agreement with the developers under the purchase and sale agreement. That document needs to be found, copied and attached to our responses to these inquiries. Mary P: talk with Mary C. as I believe we approved this extension within the last month.

(17) There are density restrictions or requirements in both the 1989 agreement and the 1991 amendments. Which of these two legal documents controls the current density requirement and how is that requirement met by the current hotel/mini-hotel proposal? (Planning)

IV Councilor Skolnik

(18) What is the legal basis for the Council's ability to impose transportation restrictions or limitations in this case? (GCW)

V Councilor Donoghue

(19) Why is this matter before the Council as a contract zone? (Planning)

(20) Is condominium a defined term in the city ordinance, and if so what is the definition? The same question for hotels and inns. (Planning)

(21) Are condos, hotels and inns allowed in other R zones? (Planning)

(22) Can we prohibit types of vehicles on public roads, and in what circumstances? (GCW)

Please get your responses to Mary P. so that she can compile them into one document in time to go out with the Council agenda for the October 6th meeting, i.e. we need all of these answers finalized and together by October 1st. Thank you.

Answers accumulated:

1. What is the actual current capacity of the wastewater treatment plan inside the cove?

Answer: The Diamond Cove wastewater treatment plan has an overboard discharge license from the Maine DEP with a maximum discharge of 35,000 gallons per day based on a monthly average. The DEP approved a license renewal in October 2005.

The DEP has not made a formal determination whether the proposed project is within the license limits because the developer has not submitted an application to the DEP to date. The developer is expected to submit an application shortly assuming the conditional zoning amendment is approved. It appears there is unused wastewater capacity that could accommodate the hotelminiums but issues of water infiltration into the treatment system need to be addressed. – *Rick Knowland, Alex Jaegerman*

2. Are the restrictions currently contained in the proposed amendments sufficient to ensure that vehicular traffic won't cross the island from the Cove to the public landing?

Answer: The amendment language is very specific about inn related vehicle traffic not crossing the island to use the public landing. It states "the owner/manager shall not provide motorized ground transportation off the Fort McKinley Project site...". Further the document states, "all owners, guests and employees will be directed to utilize Casco Bay Lines or private water shuffles arriving at the Diamond Cove landing point...and will be specifically advised not to utilize any off-site facilities, including the pier at the south end of the island".

There has been some concern that an owner or guest might hitch a ride on the Diamond Cove Association bus and use the southerly landing. With the measures summarized in the previous paragraph, this would seemingly obviate the need for someone using the association bus although not necessarily a guarantee that individuals won't sneak on.

Jim Katsiaticas, attorney representing the Diamond Island Association, proposed additional language to the amendment that they believe would tighten the provision further. – *Rick Knowland, Alex Jaegerman*

(2a) Does the developer support or oppose the restrictions as drafted in the proposed amendment?

Answer: The short answer to the question posed is yes, the developer supports the configuration of the Restrictions set forth in the Planning Board Report.¹ – *Ron Ward*

In the course of the Council deliberations on September 3, some concerns were raised about the difficulty of the text used in the Supplemental Conditions. The text used in the overall Supplemental Conditions has been studied and reworked several times and, we think, clearly stated for any party interested in

¹ If this reference to “proposed amendments” is a reference to the various permutations offered up by the various opponents, the developer does not support those. The variant offered by Diamond Island Association (J. Katsiaticas) in its August 28, 2008 analysis requires, for example, that it “shall not use motorized ground transportation of any kind to travel off the Ft. McKinley Project site . . .”. As stated repeatedly throughout the process, the developer intends to structure the Project in a manner which contains this traffic within the Ft. McKinley site. Purchasers will be made aware of all applicable conditions and ordinances. However, neither the management of this Project nor Diamond Cove Homeowners Association intends to police the ridership on the authorized common carrier vehicles traveling upon the public roadway to the public pier at the south end of the Island. Preventing taxpayers from using the public roadways serving their homes would be unprecedented and impractical, and based upon no credible evidence that the theoretical use would have any material impact upon the south end of the Island.

reviewing the applicable restrictions. By way of background, the current, proposed document is a revision to the document originally created in 1984 (adopted in 1985) at the inception of the Project. Those original Conditions have been amended to meet the needs of the Project as it has evolved. The current text, therefore, begins with the 1984 document as its required basis.

With respect to intra-Island transportation, despite all of the commentary and memos, the issue reduces down to whether this Project will be “allowed” to use the public roadway exiting the Ft. McKinley Project south to the public pier at the terminus of the roadway. The developer would summarize its intentions as follows:

None of the owners/occupants of the Project will be allowed individual motorized vehicles (as opposed to the residents in the surrounding Ft. McKinley Project);

All of the owners of the units in the Project will, by virtue of the Declaration going back to the inception of the Project, be members of Diamond Cove Homeowners Association and pay assessments thereto;

The management of this Project will not be providing ground transportation off-site to the public pier at the southerly end of the Island;

Management practices for the Project will be aimed at controlling all Project transportation within the Ft. McKinley site as part of the service package for the owners/occupants;

Management of the Project will not attempt to police the owners'/occupants' movements on the Island, or try to prevent them from using authorized common carrier vehicles of Diamond Cove Homeowners Association.

If you or the Council need more on this topic, feel free to ask. *Ron Ward*

(3) What will be the minimum impact of the hotel on City services (i.e., DPS, PFD and PPD)?

Regarding Portland Police Department:

The Department currently has no officers stationed on Great Diamond Island, and therefore Acting Chief Joseph Loughlin anticipates no impact to the Police Department.

Regarding Portland Fire Department Services:

Renovations will need to be compliant with the NFPA Life Safety Code. The facility will need to be fully sprinkled, with the water main extended and at least one hydrant added. Additionally, the pertinent codes will be applied regarding the

construction of firewalls, egress and emerging lighting, and detection and suppression systems.

(Note: The proposed amendments to the conditional zoning require the buildings to be fully sprinkled; see para. 4 in Order 55-08/09).

Hotels and motel units typically produce a higher number of calls than single-residence occupancies, based on the number of units and the transient variety of the population of those occupying those units. However, based on the number of units proposed for this study, I would predict a minimal increase in fire and EMS call volume.

– *Fred LaMontaigne*

(4) Does this proposed amendment constitute spot zoning or is it a conditional zoning amendment that is consistent with the Comprehensive Plan (Site language) and legally defensible?

Ans: I believe the proposed amendment before the City Council is an approved method of rezoning which will withstand legal challenge if adopted by the legislative body. The City's Conditional Rezoning process has been upheld by the Maine Supreme Judicial Court on at least three occasions.

In this case, the underlying zoning allows for residential uses as a permitted use. The current proposal is for residential condominiums which may be rented out by the

property owners through a central management system. Such a use is not inconsistent with the permitted uses in the underlying IR-3 zone, and should withstand a legal challenge to the use. This is especially true because the Comprehensive Plan calls for a development which is compatible with both the natural and built environment, which provides for adequate circulation and waterfront access, adequate water supply for private use and fire protection, and safe and clean disposal of solid and septic waste. The submission being considered by the Council does address each component of the Comprehensive Plan and the purpose of underlying zone.

(5) What is the current rental program within Diamond Cove for the existing units?

DCHA does not have a rental program per se, although units have been rented at Diamond Cove at least as long as I have been an owner (1995). However, there are DCHA property owners who, by choice or necessity, rent their units, primarily during the summer months. The current monthly costs of a unit (including taxes, utilities, insurance, condo fees and mortgage interest and principal) are significant, and as costs have continued to escalate in recent years, more and more unit owners have considered renting.

DCHA owners can rent their units either (i) directly, or (ii) through Great Diamond Rentals, a business operated by Ms. Mary Beth Teas, who has been a DCHA owner for over 13 years. In all cases, the renters must sign a standard lease agreement, the form of which agreement was approved by the DCHA Board and has been in place

for many years. The lease agreement contains many specific provisions, including: maximum occupancy limits; compliance with all rules and regulations of DCHA; transportation restrictions (renters may not use golf carts, for example); fees and deposits; and indemnification. The minimum term of a lease agreement is one week.

The DCHA property management company, Phoenix Management Company of Saco, Maine, has provided the DCHA Board with the following preliminary statistics about rental activity during the period of May 27, 2008 through September 14, 2008:

Number of units rented: 16*

Number of separate rental agreements: 49 (1 unit was rented once, 4 units were rented two different times, 5 units were rented 3 different times, 5 units were rented 4 different times, and one unit was rented five different times)

*The rental units are predominately located in the Phase I area of Diamond Cove (the historic parade ground area, where the Hospital and Double Barracks buildings are located). There are currently approximately 80 residential units that have been developed in Phase I. This means that for this past summer, 20% of the developed units (16 out of 80 units) were rented for some portion of the summer. Finally, the DCHA Board works closely, throughout the rental season, with Phoenix Management personnel, Mary Beth Teas and with homeowners who rent directly, in making sure that lease terms are adhered to by renters, and that DCHA rules and regulations are complied with. - *Robert M.*

Whelan, Jr.

(6) Would the proposed bar be allowed under DEP regulations and by the applicable zoning as a permitted use?

Answer: We can't speak for the DEP, but the bar is related to the wastewater flow generated by the inn. If the inn and its related activities are found to be within limits of the wastewater discharge license, presumably that would be acceptable to the DEP.

(7) Would the proposed bar be allowed under DEP regulations and by the applicable zoning as a permitted use?

Answer: On Question (7), as was mentioned at the Sept. 3 public hearing, Section 7.3.2 of the "Amended and Restated General Declaration of Covenants and Restrictions, Diamond Cove, Great Diamond Island, Portland, Maine" dated December 23, 1993 and recorded at the Cumberland County Registry of Deeds in Bk 11277 Pg 322 (the "Declaration") includes the following language:

"All areas designated as "Open Space Recreation Areas" within Phase II shall remain as open space and shall not be subdivided or built upon or otherwise altered from their natural character, except for such alteration reasonably necessary in order to maintain, repair and replace existing improvements and structures thereon, including above-ground and underground utilities, or to install new underground utilities across said areas, following which said areas will be restored as nearly as possible to their original condition."

This language is consistent with the second of the two Agreements entered into by Diamond Cove Associates with Maine Audubon Society, the Conservation Law Foundation, and the Island Institute dated March 2, 1989 and April 12, 1991, copies of both are attached. See Sec. D(1) of the April 12, 1991 Agreement. (The April 12, 1991

Agreement generally deals with Phase II at Diamond Cove, and the March 2, 1989 Agreement generally deals with Phase I at Diamond Cove.)

But there is no similar restriction in the Declaration on Open Space Recreation Areas within Phase I at Diamond Cove, and there is no question that the area proposed by The Inn at Diamond Cove for the swimming pool and service bar area is within Phase I common properties. Moreover, Section 6 of the 2007 Second Amendment to the Declaration specifically authorizes this particular use:

"Swimming Pool and Service Bar Area. In connection with the development of Building 46, the Approved Developer shall construct, at its sole cost, an in-ground swimming pool and service bar area for use by the owners, guests and tenants of the owners of the Double Barracks Lots, and (subject to reasonable rules and regulations) other members of the Association, in a location at the common properties to be agreed upon by the Approved Developer and the Association's Board of Directors. The common properties necessary for such swimming pool and service bar area shall be leased by the Association to the Building 46 Manager, subject to reasonable terms and conditions as determined by the Association's Board of Directors. The Approved Developer shall obtain, at its sole cost and to the reasonable satisfaction of the Association's Board of Directors, any and all necessary approvals (including, without limitation, from the State of Maine Department of Environmental Protection) for the proposed swimming pool and service bar area, which may be located within "Open Space Recreation Areas" of Phase I if specifically permitted by such approvals." (emphasis added)

(Note also that Sec. 6.4.9 authorizes the DCHA to "grant easements, leases, licenses and concessions through or over the common properties.") The emphasized language above expressly contemplates that The Inn at Diamond Cove would need to obtain any necessary City and DEP approvals, but there should be no question about whether this proposed use of Phase I common properties is permissible under the Declaration. – *Tony Calcagni*

In terms of City approvals, the footprint of the swimming pool and bar are located on land shown on the original conditional zoning map as dedicated open space.

Applicant asserts that a swimming pool is consistent with an open space use. Planning staff took the position this proposal represented a change to the conditional zoning and must be amended accordingly. This change is referenced in the conditional zoning amendment. -- *Rick Knowland*.

(8) What is the impact of the lawsuit that was just filed on the action being asked of the Council?

Answer: At this point in time the lawsuit does not impact the action being asked of the City Council. The role of the Council is to decide whether as a matter of policy to approve the proposed amendments to the existing conditional zoning that controls the development inside the Diamond Cove project. That decision is a legislative decision as it involves amending a City law.

The lawsuit questions the legality of the City's vote as a member of the condominium association. It does not challenge the Council's legal authority to act on proposed amendments to a conditional zone. It will be decided under state statutes applicable to condominiums and condominium associations and the rules of the Diamond Cove Homeowner's Association. It is not a question of municipal law.

If the plaintiffs prevail the project will probably not proceed regardless of the Council's action on the proposed amendment to the conditional zone.

In the litigation the City will defend its vote and its tax title. We have contacted the attorney for the plaintiffs who has confirmed that the City will be named as a party to the lawsuit in an amended complaint that will be filed and hopefully served in the near future.

(9) What was Joe's authority for casting the City's votes in the condo association vote to approve the project?

Answer: The Council authorized the City Manager to cast the City's votes in the condo association vote by passage of Order 271-06/07 on June 18th, 2007. (copy attached).

(10) What is the City's obligation to enforce or comply with third party agreements between the developer and other organizations such as the DEP and the Conservation Law Foundation?

Answer: None. The City is not a party to the agreements between the Developer and other organizations such as DEP, the Island Institute, Maine Audubon Society and the Conservation Law Foundation. The organizations that have an agreement with the

original developer or its successors-in-interest are the appropriate enforcement agencies in relation to those agreements.

(11) How have we defined for the purposes of this application the terms “residential hotel condominium”?

What is the difference between an apartment, a condo, a residential hotel condominium and a hotel under our current ordinance scheme? Are they rationally different?

Answer: The term “residential hotel condominium” is defined in the amendment “as privately owned residential condominium units (with kitchens) located within a structure that offers reasonable and customary hotel services which are limited to the unit owners, their guests, tenants in residence and members of the DCIA. The Hotelminium units may be rented (in whole or part by virtue of attached bedrooms capable of being independently rented through a “lock out” system from the remainder of the unit) for varying durations to the general public through a centralized hospitality vendor.” See also Council Order or page 14 of the Planning Board Report for full text.

Apartments and condominiums are classified in the zoning ordinance as multi-family dwellings. Dwelling units have kitchens and bathrooms.

A hotel is “a building used for more or less temporary occupancy of individuals who are lodged with or without meals, having 10 or more guest rooms”. Hotel rooms do not have kitchens and therefore are not considered to be a dwelling unit.

Hotelminiums are a hybrid. They have characteristics of a multi-family dwelling and a hotel. –*Rick Knowland*

(12) What is the Council's legal ability to impose legal restrictions on someone's right to rent their property?

Answer: A general answer to this question would be long and complicated but such an answer isn't necessary. In this case we have the specific legal authority bestowed by section 14-62 of the City Code which specifically authorizes the City Council to impose conditions and restrictions that relate to the physical development and operation (emphasis added) of the property as part of the conditional/contract zoning process.

Rental restrictions applicable to condominiums are also legal and normal in condominium projects and are usually found in the covenants and restrictions in the deeds as well as in bylaws of condominium associations.

(13) What is staff's response to the allegation that people are not living up to or being held accountable for living up to existing conditions and restrictions that have been in place for years?

Answer: This question cannot be answered without more specificity on the part of the people making the allegation. It is certainly possible that people are not living up to existing restrictions or being held accountable for violating them. When violations have been brought to the attention of City staff (note the golf cart controversy) staff has done its best to respond in a reasonable and fair way.

One unresolved complaint of which we are aware is a zoning violation by Webber Oil which we have tried to resolve by providing a potential alternate parking/storage site because that company is the only supplier of heating oil and gasoline on the island. Our efforts have not been successful to date.

The allegation made at the Council meeting on September 15th that the 20 passenger buses being used to transport Diamond Cove residents to the public landing violates the existing restrictions was new to City staff.

The use of those vehicles does not violate the existing conditional zoning agreement which allows vehicles to leave the Cove and go to the public south side pier if the vehicle is needed “primarily for ... the common transportation of goods and passengers (emphasis added)”

The use of the buses would be a violation of the language in the agreement among DCA, Maine Audubon Society, the Conservation Law Foundation and the Island Institute that restricts such transportation to the use of vans. That agreement was apparently reached in negotiations over a waste discharge application filed with the DEP by the developer of Diamond Cove in 1989 (See p. 3 of the letter dated August 28, 2008 by James Katsiaticas, Esq., for DIA). The City is not a party to that agreement and has no authority or standing to enforce it (see answer to question 10).

Staff notes that there is no current restriction on how many trips the vans can make in order to accommodate the needs of Cove residents so that enforcing that restriction by requiring smaller vehicles to be used will lead to more vehicle trips to and from the landing in order to provide transportation to Cove residents. On the record before the Council ____ it is difficult to determine as a factual matter whether the additional trips will reduce or avoid the potholes and rutting that are attributed by the DIA to the use of the buses.

(14) What are those issues that staff concludes are more properly focused on as part of a site plan application before the planning board?

Answer: The primary focus on the zoning review process at this point is land use and whether the proposal is in conformance with the comprehensive plan. The IR-3 policy section states that a proposal should have the capability of meeting the special IR-3 development standards. The Planning Board felt this policy was addressed in the application.

Detailed site development issues such as wastewater capacity, vegetation disturbance, mainland parking, solid waste disposal and emergency services will be reviewed by the Planning Board during the site plan and subdivision review process. –

Rick Knowland

(15) What is the specific role being asked of the Council in this case?

Answer: The Council is being asked, as a policy matter, to approve proposed amendments to the conditional zoning agreement that was created when the project was originally approved in 1985. This decision is a legislative decision because the end result would be a change to the current law articulated in the existing conditional zoning. The Council is not being asked, nor does it have jurisdiction to decide subjects that are properly the focus of a site plan and site plan review by the Planning Board.

The proposed amendments to the contract zone are set out in a strike and underline format in order 55-08/09.

(16) In relation to this application, does this applicant still have sufficient right title and interest for this matter to be before the Council?

Answer: Yes. The original option agreement pursuant to which this developer has sufficient right title and interest for this matter to be both before the Council and the Planning Board was executed on May 4, 2007. It was extended on September 13, 2007 and extended again on July 23, 2008 (see attachments).

(17) There are density restrictions or requirements in both the 1989 agreement and the 1991 agreements. Which of these two legal documents controls the current density requirement and how is that requirement met by the hotelminium proposal?

Answer: The 1989 and 1991 agreements are private agreements. They have no bearing on the City's zoning requirement. The original Planning Board phase one

approval included 134 dwelling units and 5 commercial buildings for the Fort McKinley complex. These numbers are exclusive of the single family subdivision (phase two).

Only 77 of the Fort McKinley units were ever built.

A land area requirement was not assigned to the hotelminium units but assuming they are considered to be dwelling units (20 in the Double Barracks and 16 in the Hospital), the total number of dwelling units is well within the allowable IR-3 density. –

Rick Knowland

(18) What is the legal basis for the Council's ability to impose transportation restrictions or limitations in this case?

Answer: As part of its decision whether to approve or not approve a conditional zone (which is actually a rezoning) and any amendments to it, the Council is free to impose transportation restrictions or limitations as part of the tradeoff for allowing a particular use or uses that would otherwise be prohibited in a particular zone. In other words the contract nature of a conditional or contract zoning agreement (they are legally the same) allows the Council to strike an agreement and in that process insist on conditions that would not normally be part of a zoning process or decision.

(19) Why is this matter before the Council as a contract zone?

The Fort McKinley complex was zoned as an IR-3 conditional zone in 1985. An IR-3 zone is a specialized island zone that is enacted with a conditional zone. As the

applicant is proposing a change in the conditional zone, this application is before the City Council. A hotelminium is not permitted in the IR-3 zone. – *Rick Knowland*

(20) Is condominium a defined term in the city ordinance, and if so what is the definition? The same question for hotels and inns?

Answer: Condominium is a form of ownership. It is not defined in the ordinance. Typically a condominium is a multi-family dwelling separately owned by an entity or an individual. An apartment is also a multi-family dwelling but individuals rent the dwelling unit.

Hotel definition: An excerpt of the hotel definition is shown in the answer to question 11.

Inn definition: “A building used for more or less temporary occupancy of individuals, who are lodged with or without meals, having 10 but not more than 50 rooms. Guest room shall not contain separate kitchen facilities.” (excerpt) – *Rick Knowland*

(21) Are condominiums, hotels and inns allowed in other R zones?

Answer: Condominiums (multi-family dwellings) are allowed in all residential zones except for the R-1, R-2, IR-1 and IR-2 zones.

Hotels are not allowed in any residential zone.

Inns are a unique term to island zoning. The IR-3 allows inns but not the IR_1 and IR-2 zones.

(22) Can we prohibit types of vehicles on public roads, and in what circumstances?

Answer: YES: As previously stated in the context of a conditional zoning you can prevent specific types of vehicles from using public roads under the language of section 14-62 that authorizes the Council to impose conditions and restrictions that relate to the “physical development and operation (emphasis added) of the property.”

In a general sense, the answer is also yes in relation to municipal roads, as opposed to state or federal roads. 29-A M.R.S.A §557 states as follows:

This subchapter does not restrict the authority of a municipality to enact ordinances to regulate and control the routing, parking, speed or safety of operation of motor vehicles; to exercise general police power over its public ways; or to require compliance with certain conditions before a motor vehicle is operated within that municipality.

Using that authority municipalities sometimes, for example, prohibit commercial vehicles from using roads through densely settled residential neighborhoods.

29-A M.R.S.A. §2395(4) authorizes prohibitions against vehicles if the weight or passage would be unsafe or likely to cause excessive damage.

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approval included 134 dwelling units and 5 commercial buildings for the Fort McKinley complex. These numbers are exclusive of the single family subdivision (phase two).

Only 77 of the Fort McKinley units were ever built.

A land area requirement was not assigned to the hotel/mini-unit but assuming they are considered to be dwelling units (20 in the Double Barracks and 16 in the Hospital), the total number of dwelling units is well within the allowable IR-3 density. –

Rick Knowland

(18) What is the legal basis for the Council's ability to impose transportation restrictions or limitations in this case?

Answer: As part of its decision whether to approve or not approve a conditional zone (which is actually a rezoning) and any amendments to it, the Council is free to impose transportation restrictions or limitations as part of the tradeoff for allowing a particular use or uses that would otherwise be prohibited in a particular zone. In other words the contract nature of a conditional or contract zoning agreement (they are legally the same) allows the Council to strike an agreement and in that process insist on conditions that would not normally be part of a zoning process or decision.

(19) Why is this matter before the Council as a contract zone?

The Fort McKinley complex was zoned as an IR-3 conditional zone in 1985. An IR-3 zone is a specialized island zone that is enacted with a conditional zone. As the

applicant is proposing a change in the conditional zone, this application is before the City Council. A hotelminium is not permitted in the IR-3 zone. – *Rick Knowland*

(20) Is condominium a defined term in the city ordinance, and if so what is the definition? The same question for hotels and inns?

Answer: Condominium is a form of ownership. It is not defined in the ordinance. Typically a condominium is a multi-family dwelling separately owned by an entity or an individual. An apartment is also a multi-family dwelling but individuals rent the dwelling unit.

Hotel definition: An excerpt of the hotel definition is shown in the answer to question 11.

Inn definition: “A building used for more or less temporary occupancy of individuals, who are lodged with or without meals, having 10 but not more than 50 rooms. Guest room shall not contain separate kitchen facilities.” (excerpt) – *Rick Knowland*

(21) Are condominiums, hotels and inns allowed in other R zones?

Answer: Condominiums (multi-family dwellings) are allowed in all residential zones except for the R-1, R-2, IR-1 and IR-2 zones.

Hotels are not allowed in any residential zone.

Inns are a unique term to island zoning. The IR-3 allows inns but not the IR_1 and IR-2 zones.

(22) Can we prohibit types of vehicles on public roads, and in what circumstances?

Answer: YES: As previously stated in the context of a conditional zoning you can prevent specific types of vehicles from using public roads under the language of section 14-62 that authorizes the Council to impose conditions and restrictions that relate to the “physical development and operation (emphasis added) of the property.”

In a general sense, the answer is also yes in relation to municipal roads, as opposed to state or federal roads. 29-A M.R.S.A §557 states as follows:

This subchapter does not restrict the authority of a municipality to enact ordinances to regulate and control the routing, parking, speed or safety of operation of motor vehicles; to exercise general police power over its public ways; or to require compliance with certain conditions before a motor vehicle is operated within that municipality.

Using that authority municipalities sometimes, for example, prohibit commercial vehicles from using roads through densely settled residential neighborhoods.

29-A M.R.S.A. §2395(4) authorizes prohibitions against vehicles if the weight or passage would be unsafe or likely to cause excessive damage.

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original developer or its successors-in-interest are the appropriate enforcement agencies in relation to those agreements.

(11) How have we defined for the purposes of this application the terms “residential hotel condominium”?

What is the difference between an apartment, a condo, a residential hotel condominium and a hotel under our current ordinance scheme? Are they rationally different?

Answer: The term “residential hotel condominium” is defined in the amendment “as privately owned residential condominium units (with kitchens) located within a structure that offers reasonable and customary hotel services which are limited to the unit owners, their guests, tenants in residence and members of the DCHA. The Hotelminium units may be rented (in whole or part by virtue of attached bedrooms capable of being independently rented through a “lock out” system from the remainder of the unit) for varying durations to the general public through a centralized hospitality vendor.” See also Council Order or page 14 of the Planning Board Report for full text.

Apartments and condominiums are classified in the zoning ordinance as multi-family dwellings. Dwelling units have kitchens and bathrooms.

A hotel is “a building used for more or less temporary occupancy of individuals who are lodged with or without meals, having 10 or more guest rooms”. Hotel rooms do not have kitchens and therefore are not considered to be a dwelling unit.

Hotelminiums are a hybrid. They have characteristics of a multi-family dwelling and a hotel. –*Rick Knowland*

(12) What is the Council's legal ability to impose legal restrictions on someone's right to rent their property?

Answer: A general answer to this question would be long and complicated but such an answer isn't necessary. In this case we have the specific legal authority bestowed by section 14-62 of the City Code which specifically authorizes the City Council to impose conditions and restrictions that relate to the physical development and operation (emphasis added) of the property as part of the conditional/contract zoning process.

Rental restrictions applicable to condominiums are also legal and normal in condominium projects and are usually found in the covenants and restrictions in the deeds as well as in bylaws of condominium associations.

(13) What is staff's response to the allegation that people are not living up to or being held accountable for living up to existing conditions and restrictions that have been in place for years?

Answer: This question cannot be answered without more specificity on the part of the people making the allegation. It is certainly possible that people are not living up to existing restrictions or being held accountable for violating them. When violations have been brought to the attention of City staff (note the golf cart controversy) staff has done its best to respond in a reasonable and fair way.

One unresolved complaint of which we are aware is a zoning violation by Webber Oil which we have tried to resolve by providing a potential alternate parking/storage site because that company is the only supplier of heating oil and gasoline on the island. Our efforts have not been successful to date.

The allegation made at the Council meeting on September 15th that the 20 passenger buses being used to transport Diamond Cove residents to the public landing violates the existing restrictions was new to City staff.

The use of those vehicles does not violate the existing conditional zoning agreement which allows vehicles to leave the Cove and go to the public south side pier if the vehicle is needed “primarily for ... the common transportation of goods and passengers (emphasis added)”

The use of the buses would be a violation of the language in the agreement among DCA, Maine Audubon Society, the Conservation Law Foundation and the Island Institute that restricts such transportation to the use of vans. That agreement was apparently reached in negotiations over a waste discharge application filed with the DEP by the developer of Diamond Cove in 1989 (See p. 3 of the letter dated August 28, 2008 by James Katsiaficas, Esq., for DIA). The City is not a party to that agreement and has no authority or standing to enforce it (see answer to question 10).

Staff notes that there is no current restriction on how many trips the vans can make in order to accommodate the needs of Cove residents so that enforcing that restriction by requiring smaller vehicles to be used will lead to more vehicle trips to and from the landing in order to provide transportation to Cove residents. On the record before the Council ____ it is difficult to determine as a factual matter whether the additional trips will reduce or avoid the potholes and rutting that are attributed by the DIA to the use of the buses.

(14) What are those issues that staff concludes are more properly focused on as part of a site plan application before the planning board?

Answer: The primary focus on the zoning review process at this point is land use and whether the proposal is in conformance with the comprehensive plan. The IR-3 policy section states that a proposal should have the capability of meeting the special IR-3 development standards. The Planning Board felt this policy was addressed in the application.

Detailed site development issues such as wastewater capacity, vegetation disturbance, mainland parking, solid waste disposal and emergency services will be reviewed by the Planning Board during the site plan and subdivision review process. –

Rick Knowland

(15) What is the specific role being asked of the Council in this case?

Answer: The Council is being asked, as a policy matter, to approve proposed amendments to the conditional zoning agreement that was created when the project was originally approved in 1985. This decision is a legislative decision because the end result would be a change to the current law articulated in the existing conditional zoning. The Council is not being asked, nor does it have jurisdiction to decide subjects that are properly the focus of a site plan and site plan review by the Planning Board.

The proposed amendments to the contract zone are set out in a strike and underline format in order 55-08/09.

(16) In relation to this application, does this applicant still have sufficient right title and interest for this matter to be before the Council?

Answer: Yes. The original option agreement pursuant to which this developer has sufficient right title and interest for this matter to be both before the Council and the Planning Board was executed on May 4, 2007. It was extended on September 13, 2007 and extended again on July 23, 2008 (see attachments).

(17) There are density restrictions or requirements in both the 1989 agreement and the 1991 agreements. Which of these two legal documents controls the current density requirement and how is that requirement met by the hotelminium proposal?

Answer: The 1989 and 1991 agreements are private agreements. They have no bearing on the City's zoning requirement. The original Planning Board phase one

Alex Jaegerman - Draft Answers to Questions Proposed by Council re: Diamond Cove

From: Theresa Bourgoin
To: acalcagni@verrilldana.com; Alex Jaegerman ; Fred LaMontagne; Joseph L...
Date: 9/26/2008 3:56 PM
Subject: Draft Answers to Questions Proposed by Council re: Diamond Cove
CC: Mary Pereira
Attachments: diamond cove council answers.doc

Attached are the draft set of answers. We hope to finalize these by next week. Thank you all for getting your responses to us quickly. If you have any changes please let us know. Thanks.

Theresa Bourgoin
Executive Legal Assistant
Office of Corporation Counsel
389 Congress Street
Portland, ME 04101
(207)874-8434
txb@portlandmaine.gov

Answers accumulated:

1. What is the actual current capacity of the wastewater treatment plan inside the cove?

Answer: The Diamond Cove wastewater treatment plan has an overboard discharge license from the Maine DEP with a maximum discharge of 35,000 gallons per day based on a monthly average. The DEP approved a license renewal in October 2005.

The DEP has not made a formal determination whether the proposed project is within the license limits because the developer has not submitted an application to the DEP to date. The developer is expected to submit an application shortly assuming the conditional zoning amendment is approved. It appears there is unused wastewater capacity that could accommodate the hotelminiums but issues of water infiltration into the treatment system need to be addressed. – *Rick Knowland, Alex Jaegerman*

2. Are the restrictions currently contained in the proposed amendments sufficient to ensure that vehicular traffic won't cross the island from the Cove to the public landing?

Answer: The amendment language is very specific about inn related vehicle traffic not crossing the island to use the public landing. It states "the owner/manager shall not provide motorized ground transportation off the Fort McKinley Project site...". Further the document states, "all owners, guests and employees will be directed to utilize Casco Bay Lines or private water shuffles arriving at the Diamond Cove landing point...and will be specifically advised not to utilize any off-site facilities, including the pier at the south end of the island".

There has been some concern that an owner or guest might hitch a ride on the Diamond Cove Association bus and use the southerly landing. With the measures summarized in the previous paragraph, this would seemingly obviate the need for someone using the association bus although not necessarily a guarantee that individuals won't sneak on.

Jim Katsiaficas, attorney representing the Diamond Island Association, proposed additional language to the amendment that they believe would tighten the provision further. – *Rick Knowland, Alex Jaegerman*

(2a) Does the developer support or oppose the restrictions as drafted in the proposed amendment?

Answer: The short answer to the question posed is yes, the developer supports the configuration of the Restrictions set forth in the Planning Board Report.¹ – *Ron Ward*

In the course of the Council deliberations on September 3, some concerns were raised about the difficulty of the text used in the Supplemental Conditions. The text used in the overall Supplemental Conditions has been studied and reworked several times and, we think, clearly stated for any party interested in

¹ If this reference to “proposed amendments” is a reference to the various permutations offered up by the various opponents, the developer does not support those. The variant offered by Diamond Island Association (J. Katsiaficas) in its August 28, 2008 analysis requires, for example, that it “shall not use motorized ground transportation of any kind to travel off the Ft. McKinley Project site . . .”. As stated repeatedly throughout the process, the developer intends to structure the Project in a manner which contains this traffic within the Ft. McKinley site. Purchasers will be made aware of all applicable conditions and ordinances. However, neither the management of this Project nor Diamond Cove Homeowners Association intends to police the ridership on the authorized common carrier vehicles traveling upon the public roadway to the public pier at the south end of the Island. Preventing taxpayers from using the public roadways serving their homes would be unprecedented and impractical, and based upon no credible evidence that the theoretical use would have any material impact upon the south end of the Island.

reviewing the applicable restrictions. By way of background, the current, proposed document is a revision to the document originally created in 1984 (adopted in 1985) at the inception of the Project. Those original Conditions have been amended to meet the needs of the Project as it has evolved. The current text, therefore, begins with the 1984 document as its required basis.

With respect to intra-Island transportation, despite all of the commentary and memos, the issue reduces down to whether this Project will be “allowed” to use the public roadway exiting the Ft. McKinley Project south to the public pier at the terminus of the roadway. The developer would summarize its intentions as follows:

None of the owners/occupants of the Project will be allowed individual motorized vehicles (as opposed to the residents in the surrounding Ft. McKinley Project);

All of the owners of the units in the Project will, by virtue of the Declaration going back to the inception of the Project, be members of Diamond Cove Homeowners Association and pay assessments thereto;

The management of this Project will not be providing ground transportation off-site to the public pier at the southerly end of the Island;

Management practices for the Project will be aimed at controlling all Project transportation within the Ft. McKinley site as part of the service package for the owners/occupants;

Management of the Project will not attempt to police the owners'/occupants' movements on the Island, or try to prevent them from using authorized common carrier vehicles of Diamond Cove Homeowners Association.

If you or the Council need more on this topic, feel free to ask. *Ron Ward*

(3) What will be the minimum impact of the hotel on City services (i.e., DPS, PFD and PPD)?

Regarding Portland Police Department:

The Department currently has no officers stationed on Great Diamond Island, and therefore Acting Chief Joseph Loughlin anticipates no impact to the Police Department.

Regarding Portland Fire Department Services:

Renovations will need to be compliant with the NFPA Life Safety Code. The facility will need to be fully sprinkled, with the water main extended and at least one hydrant added. Additionally, the pertinent codes will be applied regarding the

construction of firewalls, egress and emerging lighting, and detection and suppression systems.

(Note: The proposed amendments to the conditional zoning require the buildings to be fully sprinkled; see para. 4 in Order 55-08/09).

Hotels and motel units typically produce a higher number of calls than single-residence occupancies, based on the number of units and the transient variety of the population of those occupying those units. However, based on the number of units proposed for this study, I would predict a minimal increase in fire and EMS call volume.

– *Fred LaMontaigne*

(4) Does this proposed amendment constitute spot zoning or is it a conditional zoning amendment that is consistent with the Comprehensive Plan (Site language) and legally defensible?

Ans: I believe the proposed amendment before the City Council is an approved method of rezoning which will withstand legal challenge if adopted by the legislative body. The City's Conditional Rezoning process has been upheld by the Maine Supreme Judicial Court on at least three occasions.

In this case, the underlying zoning allows for residential uses as a permitted use. The current proposal is for residential condominiums which may be rented out by the

property owners through a central management system. Such a use is not inconsistent with the permitted uses in the underlying IR-3 zone, and should withstand a legal challenge to the use. This is especially true because the Comprehensive Plan calls for a development which is compatible with both the natural and built environment, which provides for adequate circulation and waterfront access, adequate water supply for private use and fire protection, and safe and clean disposal of solid and septic waste. The submission being considered by the Council does address each component of the Comprehensive Plan and the purpose of underlying zone.

(5) What is the current rental program within Diamond Cove for the existing units?

DCHA does not have a rental program per se, although units have been rented at Diamond Cove at least as long as I have been an owner (1995). However, there are DCHA property owners who, by choice or necessity, rent their units, primarily during the summer months. The current monthly costs of a unit (including taxes, utilities, insurance, condo fees and mortgage interest and principal) are significant, and as costs have continued to escalate in recent years, more and more unit owners have considered renting.

DCHA owners can rent their units either (i) directly, or (ii) through Great Diamond Rentals, a business operated by Ms. Mary Beth Teas, who has been a DCHA owner for over 13 years. In all cases, the renters must sign a standard lease agreement, the form of which agreement was approved by the DCHA Board and has been in place

for many years. The lease agreement contains many specific provisions, including: maximum occupancy limits; compliance with all rules and regulations of DCHA; transportation restrictions (renters may not use golf carts, for example); fees and deposits; and indemnification. The minimum term of a lease agreement is one week.

The DCHA property management company, Phoenix Management Company of Saco, Maine, has provided the DCHA Board with the following preliminary statistics about rental activity during the period of May 27, 2008 through September 14, 2008:

Number of units rented: 16*

Number of separate rental agreements: 49 (1 unit was rented once, 4 units were rented two different times, 5 units were rented 3 different times, 5 units were rented 4 different times, and one unit was rented five different times)

*The rental units are predominately located in the Phase I area of Diamond Cove (the historic parade ground area, where the Hospital and Double Barracks buildings are located). There are currently approximately 80 residential units that have been developed in Phase I. This means that for this past summer, 20% of the developed units (16 out of 80 units) were rented for some portion of the summer. Finally, the DCHA Board works closely, throughout the rental season, with Phoenix Management personnel, Mary Beth Teas and with homeowners who rent directly, in making sure that lease terms are adhered to by renters, and that DCHA rules and regulations are complied with. - *Robert M.*

Whelan, Jr.

(6) Would the proposed bar be allowed under DEP regulations and by the applicable zoning as a permitted use?

Answer: We can't speak for the DEP, but the bar is related to the wastewater flow generated by the inn. If the inn and its related activities are found to be within limits of the wastewater discharge license, presumably that would be acceptable to the DEP.

(7) Would the proposed bar be allowed under DEP regulations and by the applicable zoning as a permitted use?

Answer: On Question (7), as was mentioned at the Sept. 3 public hearing, Section 7.3.2 of the "Amended and Restated General Declaration of Covenants and Restrictions, Diamond Cove, Great Diamond Island, Portland, Maine" dated December 23, 1993 and recorded at the Cumberland County Registry of Deeds in Bk 11277 Pg 322 (the "Declaration") includes the following language:

"All areas designated as "Open Space Recreation Areas" within Phase II shall remain as open space and shall not be subdivided or built upon or otherwise altered from their natural character, except for such alteration reasonably necessary in order to maintain, repair and replace existing improvements and structures thereon, including above-ground and underground utilities, or to install new underground utilities across said areas, following which said areas will be restored as nearly as possible to their original condition."

This language is consistent with the second of the two Agreements entered into by Diamond Cove Associates with Maine Audubon Society, the Conservation Law Foundation, and the Island Institute dated March 2, 1989 and April 12, 1991, copies of both are attached. See Sec. D(1) of the April 12, 1991 Agreement. (The April 12, 1991

Agreement generally deals with Phase II at Diamond Cove, and the March 2, 1989 Agreement generally deals with Phase I at Diamond Cove.)

But there is no similar restriction in the Declaration on Open Space Recreation Areas within Phase I at Diamond Cove, and there is no question that the area proposed by The Inn at Diamond Cove for the swimming pool and service bar area is within Phase I common properties. Moreover, Section 6 of the 2007 Second Amendment to the Declaration specifically authorizes this particular use:

"Swimming Pool and Service Bar Area. In connection with the development of Building 46, the Approved Developer shall construct, at its sole cost, an in-ground swimming pool and service bar area for use by the owners, guests and tenants of the owners of the Double Barracks Lots, and (subject to reasonable rules and regulations) other members of the Association, in a location at the common properties to be agreed upon by the Approved Developer and the Association's Board of Directors. The common properties necessary for such swimming pool and service bar area shall be leased by the Association to the Building 46 Manager, subject to reasonable terms and conditions as determined by the Association's Board of Directors. The Approved Developer shall obtain, at its sole cost and to the reasonable satisfaction of the Association's Board of Directors, any and all necessary approvals (including, without limitation, from the State of Maine Department of Environmental Protection) for the proposed swimming pool and service bar area, which may be located within "Open Space Recreation Areas" of Phase I if specifically permitted by such approvals." (emphasis added)

(Note also that Sec. 6.4.9 authorizes the DCHA to "grant easements, leases, licenses and concessions through or over the common properties.") The emphasized language above expressly contemplates that The Inn at Diamond Cove would need to obtain any necessary City and DEP approvals, but there should be no question about whether this proposed use of Phase I common properties is permissible under the Declaration. -- *Tony Calcagni*

In terms of City approvals, the footprint of the swimming pool and bar are located on land shown on the original conditional zoning map as dedicated open space.

Applicant asserts that a swimming pool is consistent with an open space use. Planning staff took the position this proposal represented a change to the conditional zoning and must be amended accordingly. This change is referenced in the conditional zoning amendment. – *Rick Knowland*.

(8) What is the impact of the lawsuit that was just filed on the action being asked of the Council?

Answer: At this point in time the lawsuit does not impact the action being asked of the City Council. The role of the Council is to decide whether as a matter of policy to approve the proposed amendments to the existing conditional zoning that controls the development inside the Diamond Cove project. That decision is a legislative decision as it involves amending a City law.

The lawsuit questions the legality of the City's vote as a member of the condominium association. It does not challenge the Council's legal authority to act on proposed amendments to a conditional zone. It will be decided under state statutes applicable to condominiums and condominium associations and the rules of the Diamond Cove Homeowner's Association. It is not a question of municipal law.

If the plaintiffs prevail the project will probably not proceed regardless of the Council's action on the proposed amendment to the conditional zone.

In the litigation the City will defend its vote and its tax title. We have contacted the attorney for the plaintiffs who has confirmed that the City will be named as a party to the lawsuit in an amended complaint that will be filed and hopefully served in the near future.

(9) What was Joe's authority for casting the City's votes in the condo association vote to approve the project?

Answer: The Council authorized the City Manager to cast the City's votes in the condo association vote by passage of Order 271-06/07 on June 18th, 2007. (copy attached).

(10) What is the City's obligation to enforce or comply with third party agreements between the developer and other organizations such as the DEP and the Conservation Law Foundation?

Answer: None. The City is not a party to the agreements between the Developer and other organizations such as DEP, the Island Institute, Maine Audubon Society and the Conservation Law Foundation. The organizations that have an agreement with the

From: Ronald Ward <rnw@dwmlaw.com>
To: Gary Wood <GARY@portlandmaine.gov>, 'Mary Costigan'
<MEC@portlandmaine.gov>, "Penny Liffell " <PL@portlandmaine.gov>
Date: 9/3/2008 10:59:44 AM
Subject: PCC memo.doc

Gary et al- Robitzek Memo launched yesterday and, no doubt, what the Council will hear tonight. I won't bore you with the incredible factual inaccuracies or improbably legal conclusions. The point is that tonight is about whether the Council wants to implement zoning changes to allow this Project to take the next step along the path. The nature of the opposition from the few well- heeled opponents is now well documented.

Robitzek memo
September 2, 2008

TO: City Council, City of Portland
From: Bill Robitzek
Date: September 2, 2008
RE: Great Diamond Island hearing, set for September 3, 2008, 5 pm

Dear Councilors:

I have been a property owner on great Diamond Island for about the last 20 years. During that time, I have been active in various island community projects and the island's relationship with the City. I am enclosing a memo providing reasons why the pending application for spot zoning a "hotelminium" on Great Diamond Island should be denied. I appreciate your consideration of this matter.

Bill Robitzek

Robitzek memo
September 2, 2008

Great Diamond Island Basics:

- * The island is essentially in four parts:
 - * The Diamond Cove/Fort McKinley area in the north, where the Double Barracks development is proposed and which contains its own public ferry pier at Diamond Cove. All its residents are members of the Diamond Cove Homeowners Association;
 - * The cottage community at the southwest composed of about 75 turn-of-the-nineteenth-century homes. These homes are joined together as one of the first planned communities in Maine, the Diamond Island Association, founded in 1882;
 - * The Glickman property to the southeast; and
 - * The Savastano property at the southern end over which the city has a right of way on top of a narrow strip of rock, the isthmus, to the State Pier.

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Robitzek memo
September 2, 2008

There are several good reasons not to spot zone the IR-3 zone to accommodate a hotelinium on Great Diamond Island:

- * A zoning change will cause the city to waste even more valuable resources than it has already lost on these properties:
 - * LEGAL FEES: If the zoning change passes, the City will likely be the subject of an 80B appeal which it will lose
 - * As described in detail below, there are many good reasons not to allow the spot zoning change in favor of this hotelinium
 - * Although the developer may appeal a negative vote, the City will be in a much more defensible position legally if it denies the spot zoning change than if it grants it. There is always a heavier burden placed on the one who wants to change the current law (the developer) and therefore Courts are more inclined to side with municipalities who decide not to change their ordinances.
 - * An affirmative vote by the Council which changes the zoning, will likely subject it to an appeal on at least the grounds listed below, and a reversal by the Court is much more likely.
 - * LOST TAXES
 - * The developer proposes to buy the two buildings from the city for \$1 and will not be paying any of the accumulated taxes.
 - * On August 21, 2008, The Friends of Great Diamond Island offered to buy out the City's position in the Double Barracks building and to pay the City all the back taxes and the 2009 assessment, totaling approximately \$48,000. The next day, The Friends were advised that the offer could not be accepted because the City had extended their contract with the developer to sell the building for the dollar.

* FURTHER PROCEEDINGS

* Because the spot zoning change being requested is so specific to the Hart/Bateman project, if their project does not get the various government or third party approvals (see below) or does not survive litigation (see below) or does not get financing (see below), the City Council will have changed the zoning on these two buildings for no good reason. Any further development plan will require the City's Planning Board and Council to re-re-zone the buildings.

*

Robitzek memo
September 2, 2008

A 44 room hotel was never part of the city's, the DEP's or the island's plan for GDI:

* A hotel is a prohibited use in the IR-3 zone and is contrary to the city's Comprehensive Plan

* See the Comprehensive Plan

* Code of Ordinance §14-145.14 and 14-125.15 ("Uses that are not expressly enumerated herein as either permitted uses or conditional uses are prohibited".)

* Memorandum, Rick Knowland to Planning Board, May 9, 2008 ("not among the permitted uses listed in the IR-3 zone".)

* The project is a "hotel" not an "inn" according to the zoning ordinance definitions.

* Even if this were an "Inn", these units do not even contain the minimum square footage required for an "Inn", "Ten thousand (10,000) square feet for each lodging room", §14-145.17.2., let alone the 35,000 square feet required for "Other uses." §145.17.7, should another, non-permitted use as a hotel room be allowed.

* One of the reasons the IR-3 zone does not permit hotels is that the Comprehensive Plan designates IR-3 land as "rural"

* Comprehensive Plan: "Portland's islands are also considered rural areas with limited development potential... Thus the islands are not targeted for growth". P.58

* Picking out these two buildings to create a "hotelminium", which the city's zoning does even recognize as a defined term or use, would be a classic example of "spot zoning" which is disfavored by the Courts

* The DEP had approved renovation of this and other buildings for "single-family residential units", not rental units.

* DEP Site Location Order, June 25, 1991, para. 1.

* The DEP only approved five buildings for commercial use at Fort McKinley. The Double Barracks and Hospital were not among them.

* DEP Site Location Order, December 10, 1986, para. 2

* The covenants of the Diamond Cove Homeowners Association did not permit this transient use of the buildings

* A special vote of unit owners had to be taken to amend their covenants in order to permit this change of use.

* As discussed below, the only way in which this change was arguably permitted was because the city, perhaps unbeknownst to the City Council, participated and cast votes to change the character and direction of the Cove.

*

Robitzek memo
September 2, 2008

Two recent presidents of the Diamond Cove Homeowners Association drafted and circulated a detailed memorandum as to why unit owners should vote against the change.

- * Their position and that of the majority of the actual residents (as opposed to investor-owners) at the Cove would have prevailed if the City had not cast 23 votes.

- * The original plan for the Cove never contemplated this use for the Double Barracks. It recognized only that an 18 room bed and breakfast be located in the "mines" building, a considerable distance away from the residential area, and a building approved by the DEP for commercial use.

- * This hotel will drastically change the nature and culture of the island community

- * The Cove homeowners and the members of the cottage community, as this Council is well aware, were at odds for many years concerning a number of island-related issues

- * Within the last few years, the residents and associations of both sides have developed social and other relationships which have stabilized and enriched the island's common culture as a retreat for families to enjoy

- * The introduction of a transient population, overburdening the fragile resources and infrastructure of the island is not a change which benefits anyone except those who stand to gain financially from this project.

- * The developer proposes 20 units, 16 of which have "lockout doors". This enables the hotel to rent out 36 hotel rooms. Some of these units are designed with seven (7) beds.

- * To the island, it will mean overcrowded ferries with a constantly changing cast of characters on the island, significant traffic with the needs of a nearly 40 unit hotel and its guests having to be met, significant additional overboard wastewater discharge and solid waste.

- * To an island where the Cove's Parade Ground, where the Double Barracks is located, has only about 60 families and the cottage community has only seventy homes, the ever-changing influx and egress of 40 hotel groups, staying at the hotel perhaps for only a night at a time, means that the small population of residents will quickly be overwhelmed by hundreds of transient guests who will add nothing to the island but waste, noise and traffic.

- * The project, as proposed, will lead to irreversible environmental damage and may lead the City into a lawsuit:

- * **OVERBURDENED ACCESS:** The narrow strip of rock, the isthmus, to the state pier is private property

- * The City merely has a right of way over it

Robitzek memo
September 2, 2008

[cid:image002.jpg@01C90DB4.12E6F4D0]

- * Gravel is "shored up" to permit passage over it

- * Simple rainstorms cause drainage and passability problems

- * The isthmus is a delicate environmental feature which is already overburdened by the current Cove shuttle buses

- * If the project is allowed any access to the state pier, the developer's people, goods, contractors, etc will have to travel over this isthmus

- * The overburdening of a right of way can result in a lawsuit and the forfeiture (in this case by the public) of the right of way

- * **WASTEWATER:** The DEP has expressed concern about the wastewater system's "inflow and

infiltration being uncontrolled".

* Michael Demerest quoted by Rick Knowland, Memorandum, Rick Knowland Planning Board, May 9, 2008

* This begs the question: why would the city want to permit and encourage the overboard discharge into Casco Bay of a hotel's waste?

* OPEN SPACE: This project converts an area which was required to be left as open space "in perpetuity" into a swimming pool.

Robitzek memo
September 2, 2008

* These developers have a history of attempted overdevelopment, confrontation and failure in developing GDI:

* The original development of Fort McKinley was to cost over \$17,000,000

* DEP Site Location Order

* The original proposed development was so threatening to the island's environment and culture that it provoked Maine Audubon Society, Conservation Law Foundation and the Island Institute to intervene to stop it.

* After years of resistance by the developer, the intervention of these three groups and concerned islanders in the DEP and city proceedings led to the significant scaling back of the project with significant restrictions some of which are still being violated.

* Even with the final governmental approvals, the project collapsed under these developers and was bought out for a reported \$1.7million

* The Batemans then were involved in five years of litigation with the succeeding developers in which the Batemans claimed that they had been defrauded.

* The Batemans failure to live up to the transportation restrictions which the City had established as conditions for approving the project then involved the City in years of litigation.

* Like what is requested today, they were supposed to have informed buyers at the Cove that the City had ordered that they could not own vehicles. The buyers were not informed and that led to years of litigation and hearings.

* Requiring the developer now to use its "best efforts", as contained in the proposed language from the Planning Board, will be entirely ineffective as it has been in the past.

* Governmental restrictions on this development have been and continue to be disobeyed or ignored:

* There is a history of violated zoning conditions:

* The 1985 Conditional Rezoning by the City required that the project, including the development of all residential units, were to be completed within 3 years, that is, by 1988.

* Conditional Rezoning of Ft. McKinley, Condition 2.

* The 1985 Conditional Rezoning by the City required that the developer acquire and lease to the city a fully functional fire truck and a multi-purpose van "for public safety and emergency purposes". Not done or being done.

* Conditional Rezoning of Ft. McKinley, Condition 7.

* Bateman's original plan to renovate Fort McKinley was granted by the City with the explicit condition that "No private motor vehicles shall enter or exit the southerly boundary of the Diamond Cove property."

Robitzek memo
September 2, 2008

Letter, July 10, 1987, to David Bateman from Jack Humenik, Planning Board Chairman.

* See also, Agreement signed by David Bateman on behalf of Diamond Cove Associates with Maine Audubon Society, Conservation Law Foundation and the Island Institute, March 2, 1989, para. D.

* This condition was quickly broken by the those who bought units, claiming they were never informed of the restriction by the developer

* The DEP required that the household waste of the Cove was to be "transported to South Portland for incineration". In fact, the Cove's waste is received at the DPW site on DIA property and transported by the City from the island to South Portland.

* DEP Site Location Order, June 25, 1991, para. 5.

* The Cove was ordered by the Council to prepare and present a comprehensive transportation plan for city approval

* A proposed plan was not presented until almost 2 years later

* The City has still refused to approve the Cove's plan because of the Cove's insistence it has the right to close down the City's barge landing access to the island

* Regarding the present project, Mr. Bateman has refused to live up to his own assurances regarding transportation

* He himself said to the Planning Board at the first workshop that the project will not use the state pier for any reason.

* At the next workshop, however, he and his lawyer refused to agree to any language restricting the project's use of the state pier.

* At the Planning Board meeting, they then insisted that their hotel users will have the same rights as any unit owner in the Cove and therefore claim the right to access the state pier at-will via shuttle buses.

* Bateman was less than straightforward about what he proposes here.

* His Workshop presentation was of a 20 unit development. On reviewing the plans and the use of "lock-out" units, Rick Knowland asks: "Is this a 20 unit condominium hotel or is it a 34 unit hotel?"

* Memorandum, Rick Knowland to Planning Board, May 9, 2008, p.3.

*

Robitzek memo
September 2, 2008

Changing the IR-3 zone so as to Spot Zone these two building is premature:

* The Batemans have not even applied to the DEP for, let alone been granted, the necessary permits for this project

* Telephone conference with Mary Beth Richards, DEP.

* The Cove Homeowners have not given valid permission to permit this project under their covenants

* See lawsuit filed in Cumberland County Superior Court

* The Batemans have no financial commitment from a lending institution for this project.

* Letter, David Bronson of TD Banknorth to Rick Knowland, April 29, 2008 ("TD Banknorth has not issued a commitment to provide construction financing for this project. The bank would welcome the opportunity to discuss the possibility of financing the project with the project owners at some point in the future.")(emphasis added).

* The developer has failed to satisfy the basic ordinance requirements for a change of use of these buildings

* The Batemans have no standing to ask for this change because they have no legal right to the property

* The developer claims to have the right to ask for this change because of a purchase and sale agreement entered into with the city to buy the property for a dollar

* The city's ability to convey the property is solely based on whether it obtained ownership to the

building by properly foreclosing on tax liens

- * The city failed to properly foreclose on the property and therefore has no ability to sell to the developer what it does not own:

- * Tax liens incorrectly identified the taxed owner

- * Maine law indicates that any misidentification of the owner invalidates the tax lien.

- * And in any case, the City has not, on its tax rolls, agreed that it was ever the owner of the buildings

- * 2009 Tax Assessors records and bills still refer to the owner as The Double Barracks at Diamond Cove, LLC., not the city.

- * In order to be able to request this change, the developer needed to change the covenants to the Cove development. The developer apparently believed that a two-thirds vote of the unit owners was required. Two-thirds barely voted to approve the change, but only because the city's affirmative vote of the units allocable to the double barracks and hospital was counted.

- *

Robitzek memo

September 2, 2008

As noted above, if the city never owned the buildings, they could not have exercised any votes, favorable or not.

- * Second, this Council never authorized any vote to be cast on behalf of the city.

- * Unfortunately for the developer, it was relying upon the wrong language in the Cove Declaration in believing it could be amended by a two-thirds vote to provide for the project. The Declaration in fact provides that restrictions concerning the use of buildings "run with the land" and cannot be altered until 2010, when an 80% vote could bring about the requested change.

- * The developer therefore has no right, title or interest in the property to be asking the City for any approval at this time.

From: Rick Knowland
To: Alex Jaegerman ; Penny Littell
Date: 9/1/2008 2:13:55 PM
Subject: Fwd: diamond cove double barracks project

fyi.

>>> Donna Schwartz <dlshrs@maine.rr.com> Sunday, August 31, 2008 >>>
dear city council members:

please be advised that some of the very same diamond cove homeowners who are now opposing the double barracks project and have entered into litigation against the city, the developer and the diamond cove board,

are some of the same individuals who were on the diamond cove board at the time that mckinley's partners was still the developer.

they took way too long to reach a settlement w/the developer - enough time (approx.3 yrs.) in which mckinley partners reneged on their real estate taxes and the city automatically foreclosed.

some of the same individuals while acting as a board member excused the developer from the assessments.

in other words - these are some of the same individuals who created this situation to begin with!

"the past being the prologue"

years ago, the following homeowners: ron fitch, holly fitch, barbara young and james fast led the way to having one of our commercial entities "stowaways" shut down due to a zoning issue - never once coming before the community for a conversation, a debate, dialogue and more importantly, a community vote.! they just up and had it shut down.

now out of the 19 votes that they had on a petition only 7 are still home owners - the others moved on - those of us remaining on diamond cove were negatively impacted by the removal of one of our commercial entities!

some of the same seven, along with others, are now leading the way to litigation.

the diamond cove homeowners took a vote - the majority wants very much for this project to proceed ahead w/o further delay!

I would encourage the city council to take strong and fast measures against their actions!

THANK YOU.

most sincerely,
donna schwartz
diamond cove

From: Rick Knowland
To: Alex Jaegerman ; Penny Littell
Date: 9/1/2008 2:14:25 PM
Subject: Fwd: Zoning Amendment Hearing for Diamond Cove 9/3/08

fyi.

>>> <bspark@mac.com> Sunday, August 31, 2008 >>>
To Mr Rick Knowland and Members of the Portland City Council,

We have owned property at Diamond Cove for 9 years and voted YES with 100% enthusiasm and conviction last year to change the Diamond Cove Homeowners Association Covenants to allow the restoration of the derelict Double Barracks and Hospital into Hotel Condominiums by The Inn at Diamond Cove LLC.

Please vote YES to amend the IR-3 Conditional Zone for Fort McKinley so that this project may proceed. This is the first time that a solid, thorough proposal has been offered to restore these historical buildings. In their present condition, they are and have been a drain on our community in many ways. We need to move forward to not only restore these buildings but end the ownership issue once and for all. It is good for Diamond Cove and GOOD for the City of Portland.

Thank You,

John and Bobby Spark
Lot 66
Diamond Cove

From: Rick Knowland
To: Alex Jaegerman ; Penny Littell
Date: 9/1/2008 2:15:17 PM
Subject: Fwd: Diamond Cove

fyi.

>>> Macomber Peter <pbm@macomber.com> Friday, August 29, 2008 >>>
Mr. Knowlton, Mayor Suslovic, Manager Gray and Council Members;

My wife and I are part-time residents of Diamond Cove (4-5 months per year) with permanent residency in Portland. We have been owners at Diamond Cove since 1998 and had been renting on the Village side of the island since 1982.

We, like the majority of Diamond Cove residents, are in favor of the development of the Double Barracks and the Hospital. We feel that it will not harm the so-called "fragile island environment and overtaxed ecosystem" of the island. Nor will it prevent "kids drawing with chalk and riding scooters". What it will do is preserve an historically significant structure and add significantly to the financial well-being of the Cove.

The vote last year was 100 to 45 in favor of the project. Even if the city's 23 votes were taken away, the tally of 77 to 45, though not technically a "super majority", should still be taken as a landslide mandate. The disgruntled few will try to cast this as a "nearly even divide", but do not be deceived - the majority want this project to happen.

If this project is stopped, what will happen to the derelict buildings? Will the Historic Preservation Commission allow them to be demolished? They have indicated that they would fight any effort to do so. And who would pay for the demolition anyhow ... the city? The Homeowners Association? The Friends of Great Diamond Island LLC? Hmmm.

The PR releases for this group have stated: "The goal of The Friends of Great Diamond Island is to promote a use for the buildings more compatible with being one of the few remaining pockets of traditional Maine island culture." Rumor has it that a group of islanders associated with the Friends plan to develop the Double Barracks themselves with the original number of lots (14) instead of the 22 created by the Second Amendment. If so, this would 1) put about the same number of new people on the island and 2) show that the group's legal manipulations are in reality self-serving and hypocritical.

I am not a lawyer and don't know how strong the minority's legal arguments are. But I do know that they have mounted an intensive PR campaign with the media and will probably pack the Council Chambers on Wednesday. Again, please be reminded that a significant majority of homeowners want this project to go forward!

As a side note, I am bemused by some of the anti-development justifications; they say that they want to preserve their peaceful island community and that development will ruin it - precisely the same arguments used against the original Diamond Cove development back in the 1980's. Had the opponents prevailed back then, the people complaining now wouldn't even be living on the island. And isn't it interesting that the 1980's dreaded Cove commercial development has turned into today's idyllic island community. Just shows that the "fragile island environment" is more resilient than they claim and that there is room for all and more.

Sincerely,

Peter & Pam Macomber
Lot 18 / Diamond Cove
88 Fessenden Street

Daniel Amory*
Harry R. Pringle*
Richard A. Spencer*
Gerald M. Zelin†
Ronald N. Ward*
David J. Becker*
John S. Kaminski*
William L. Plouffe*
Jerrol A. Crouter*
Michael E. High*
Richard A. Shinay*
Bruce W. Smith*
Gary D. Vogel*
E. William Stockmeyer*
Benjamin E. Marcus*
Melissa A. Hewey†
Eric R. Herlan†
Jeanne M. Kincaid†
Gregory W. Sample*
Daniel J. Rose†
Kaighn Smith, Jr.*
Daina J. Nathanson*
Edward J. Kelleher*
S. Campbell Badger*
Melissa L. Cilley◊
Amy K. Tchao†
David S. Sherman, Jr.*
Robert P. Nadeau*
Catherine D. Alexander*
Brian D. Willing*
John Lisnik, Jr.†
Aaron M. Pratt†
James C. Schwellenbach†
Elizabeth D. McEvoy*
Jeffrey T. Piampiano*
Peter C. Felmly*
Jessica M. Emmons*
Jonathan M. Goodman*
Abigail Greene Goldman*
Amy J. Visentin*
Sara S. Hellstedt*
Brienne M. Martin*

Consultants

Roger P. Kelley
Labor Relations &
Conflict Management

Ann S. Chapman
Policy & Labor Relations

Christopher P. O'Neil
Governmental Affairs

Michael J. Opuda Ph.D.
Special Education

Of Counsel

Harold E. Woods, Jr.*
Hugh G. E. MacMahon*
Joseph L. Delefeld III*
Robert L. Gips*
Donald A. Kopp*

* Admitted in Maine
† Admitted in New
Hampshire
◊ Admitted in Missouri

MEMORANDUM

TO: Gary Wood, Esq.
FROM: Ron Ward
RE: The Inn At Diamond Cove – Transportation Issues
DATE: September 24, 2008

You have asked the developer for our response to the question of whether we support the restrictions on Island traffic “as drafted in the proposed amendment”. As we understand the question, that amendment is reflected in paragraph 5 of the Supplemental Conditions, beginning on page 13 of the Planning Board Report submitted to the Council for its public hearing on August 18, delayed to September 3, 2008.

The short answer to the question posed is yes, the developer supports that configuration of the Restrictions set forth in the Planning Board Report.¹

In the course of the Council deliberations on September 3, some concerns were raised about the difficulty of the text used in the Supplemental Conditions. The text used in the overall Supplemental Conditions has been studied and reworked several times and, we think, clearly stated for any party interested in reviewing the applicable restrictions. By way of background, the current, proposed document is a revision to the document originally created in 1984 (adopted in 1985) at the inception of the Project. Those original Conditions have been amended to meet the needs of the Project as it has evolved. The current text, therefore, begins with the 1984 document as its required basis.

With respect to intra-Island transportation, despite all of the commentary and memos, the issue reduces down to whether this Project will be “allowed” to use the public roadway

¹ If this reference to “proposed amendments” is a reference to the various permutations offered up by the various opponents, the developer does not support those. The variant offered by Diamond Island Association (J. Katsiaticas) in its August 28, 2008 analysis requires, for example, that it “shall not use motorized ground transportation of any kind to travel off the Ft. McKinley Project site . . .”. As stated repeatedly throughout the process, the developer intends to structure the Project in a manner which contains this traffic within the Ft. McKinley site. Purchasers will be made aware of all applicable conditions and ordinances. However, neither the management of this Project nor Diamond Cove Homeowners Association intends to police the ridership on the authorized common carrier vehicles traveling upon the public roadway to the public pier at the south end of the Island. Preventing taxpayers from using the public roadways serving their homes would be unprecedented and impractical, and based upon no credible evidence that the theoretical use would have any material impact upon the south end of the Island.

exiting the Ft. McKinley Project south to the public pier at the terminus of the roadway. The developer would summarize its intentions as follows:

None of the owners/occupants of the Project will be allowed individual motorized vehicles (as opposed to the residents in the surrounding Ft. McKinley Project);

All of the owners of the units in the Project will, by virtue of the Declaration going back to the inception of the Project, be members of Diamond Cove Homeowners Association and pay assessments thereto;

The management of this Project will not be providing ground transportation off-site to the public pier at the southerly end of the Island;

Management practices for the Project will be aimed at controlling all Project transportation within the Ft. McKinley site as part of the service package for the owners/occupants;

Management of the Project will not attempt to police the owners'/occupants' movements on the Island, or try to prevent them from using authorized common carrier vehicles of Diamond Cove Homeowners Association.

If you or the Council need more on this topic, feel free to ask.

RNW:kjl

**QUESTIONS AND ISSUES THAT NEED TO BE ADDRESSED
BY STAFF IN RESPONSE TO INQUIRIES FROM THE COUNCIL
ON THE GREAT DIAMOND COVE HOTELMINIUM PROJECT**

Email To: Penny Littell, Alex Jaegerman, Rick Knowland, Fred LaMontaigne, Joe Loughlin, Ron Ward at Drummond Woodsum, Tony Calcagni at Verrill Dana

Re: Council inquiries or request for information for the October 6th Council meeting regarding Diamond Cove Hotelminium project

I Councilor Mavodones

(1) What is the actual current available capacity at the waste treatment plant inside the Cove (Planning)

(2) Are the restrictions currently contained in the proposed amendments sufficient to ensure that vehicular traffic won't cross the island from the Cove to the public landing? (Planning) NB: Jim Katsiaficas has proposed more exacting restrictions that are attached to his letter.

a. Does the developer support or oppose the restrictions as drafted in the proposed amendment? (Ron Ward)

In general, several councilors questioned whether the traffic restriction language in the current proposal is actually sufficient to be binding in a meaningful way on property owners within the Cove and those who will be using the hotelminium.

(3) What will be the impact of the hotelminium on City services: DPS, PFD and PPD? (question posed by several councilors) (Mike Bobinsky, Fred Lamontaigne, Joe Loughlin)

Put another way, would the City need to increase its level of any of the above services if the hotelminium is approved?

(4) Does this proposed amendment constitute spot zoning or is it a conditional zoning amendment that is consistent with the Comprehensive Plan (Site language) and legally defensible? (Penny Littell)

(5) What is the current rental program within Diamond Cove for the existing units? (Attorney Tony Calcagni at Verrill Dana)

(6) Would the proposed bar be allowed under DEP regulations and by the applicable zoning as a permitted use? (Planning)

(7) Is the proposal to eliminate some of the ROS space illegal under the current controls and regulations governing uses and zoning within the Cove? NB Tony Calcagni answered this question: the ROS issue raised by those objecting to the project is not applicable to Phase 1 of the Diamond Cove development, which is the phase that we are still in. The language cited by opponents in 7.3.2 of the declarations in which it is stated that land in an ROS classification shall remain in that classification forever is only applicable to phase 2 of the proposed development.

Can Planning confirm that he is correct that this is phase 1 of the development, and what makes that so?

(8) What is the impact of the lawsuit that was just filed on the action being asked of the Council? (GCW)

(9) What was Joe's authority for casting the City's votes in the condo association vote to approve the project? (GCW)

Mary P: Please search or ask Mary C. about this issue because I believe that she spotted it and we actually drafted an order that we sent to the Council for approval that authorized him to cast these votes. If not, she may remember what we did to decide that Joe could cast the votes and it may be reflected somewhere in the file.

II. Councilor Anton

(10) What is the City's obligation to enforce or comply with third party agreements between the developer and other organizations such as DEP and the Conservation Law Foundation? (GCW)

Answer: none.

(11) How have we defined for the purposes of this application the terms "residential hotel condominium"?

What is the difference between an apartment, a condo, a residential hotel condominium and a hotel under our current ordinance scheme? Are they rationally definitionally different?

(12) What is the Council's legal ability to impose legal restrictions on someone's right to rent their property? (GCW)

(13) What is staff's response to the allegations by opponents to the project that people already are not living up to or being held accountable for living up to existing conditions and restrictions that have been in place for years?

(14) What are those issues that staff concludes are more properly focused on as part of a site plan application before the planning board?

NB: I believe Rick Knowland's memo already answers this question specifically.

III Councilor Leeman

- (15) What is the specific role being asked of the Council in this case? (GCW)
- (16) In relation to this application, does this application still have sufficient right title and interest for this matter to be before the Council?

NB: The backup documents do not contain what I believe is the latest extension of our agreement with the developers under the purchase and sale agreement. That document needs to be found, copied and attached to our responses to these inquiries. Mary P: talk with Mary C. as I believe we approved this extension within the last month.

- (17) There are density restrictions or requirements in both the 1989 agreement and the 1991 amendments. Which of these two legal documents controls the current density requirement and how is that requirement met by the current hotel/miniium proposal? (Planning)

IV Councilor Skolnik

- (18) What is the legal basis for the Council's ability to impose transportation restrictions or limitations in this case? (GCW)

V Councilor Donoghue

- (19) Why is this matter before the Council as a contract zone? (Planning)
- (20) Is condominium a defined term in the city ordinance, and if so what is the definition? The same question for hotels and inns. (Planning)
- (21) Are condos, hotels and inns allowed in other R zones? (Planning)
- (22) Can we prohibit types of vehicles on public roads, and in what circumstances? (GCW)

Please get your responses to Mary P. so that she can compile them into one document in time to go out with the Council agenda for the October 6th meeting, i.e. we need all of these answers finalized and together by October 1st. Thank you.

Alex Jaegerman - Fwd: RE: GDI Supplement

From: Rick Knowland
To: Alex Jaegerman ; Penny Littell
Date: 7/31/2008 8:26 AM
Subject: Fwd: RE: GDI Supplement

See email from Jim K. I was afraid this would happen.

>>> <jkatsiaficas@perkinsthompson.com> Wednesday, July 30, 2008 >>>
 Rick:

I understand the time you've put into working on this draft of the Planning Board recommendations, so please forgive me for making any comments on the draft.

First, both the Applicant's draft Supplemental Conditions and Restrictions and the City's revision to that document in Section 5 leave out the phrase "at its own expense" (from the seventh line, after the word "shall") which appears in paragraph 8 of the 1985 conditional rezoning ordinance. That phrase makes clear that the Owner/Manager of the Premises is responsible for the full cost of any replacement year-round water carrier service in the event CBITD no longer provides that service. The Supplemental Conditions and Restrictions were intended to be consistent with the initial conditional rezoning amendment, but it lacks this provision, as I pointed out to the Planning Board at the public hearing. I assume its omission from the Planning Staff's Attachment 2-A-1 to the June 24, 2008 Staff Report was inadvertent and was because the Planning Staff redraft was based on the Applicant's own submittal, which omitted the phrase in the first place.

Second, the recommendations as drafted leave the door open for the new Double Barracks/Hospital Building Owner/Manager, guests and employees to use (but not "provide") motorized ground transportation off the Fort McKinley Project site subject to existing ordinances, rules and regulations regarding the same. This is inconsistent with, but **not** prohibited by, the sentence the Planning Board added to incorporate the Applicant's own representations in its April 29, 2008 memorandum to the Planning Department that was the source of this sentence. However, the very next sentence after the one quoted from that same memorandum clearly closes this loophole: "Over time, it is possible that the Project and DCHA will collaborate on certain transportation **but the Project will not be collaborating on any transportation which exits the Ft. McKinley site.**" (Emphasis added). This intent of the Planning Board's recommendation could be strengthened and any ambiguity eliminated, in accordance with the Applicant's own representations, by rewriting the third sentence of section 5 to read:

The Owner/Manager shall not provide motorized ground transportation off the Ft. McKinley Project site and/or to the public pier at the southerly end of Great Diamond Island, and the Owner/Manager, guests and employees of the Premises shall not use motorized ground transportation off the Fort McKinley Project site and/or to the public pier at the southerly end of Great Diamond Island.

There is no need to refer to motorized ground transportation outside of the Fort McKinley Project site under the existing ordinances, rules and regulations if the Applicant has no intent to provide or use such transportation for those who own, rent or use or are employed at the new Double Barracks and Hospital Building hotelminium units.

Thank you for your consideration and assistance.

Jim

-----Original Message-----

From: Rick Knowland [mailto:RWK@portlandmaine.gov]

Sent: Wednesday, July 30, 2008 3:59 PM

Alex Jaegerman - Fwd: Inn at Diamond Cove- Great Diamond Island

From: Rick Knowland
To: Alex Jaegerman ; Penny Littell
Date: 7/10/2008 8:35 AM
Subject: Fwd: Inn at Diamond Cove- Great Diamond Island

>>> Ronald Ward <rnw@dwmlaw.com> Thursday, July 10, 2008 >>>

Joe et al- I assume Joe is still out but sending this along in order to keep the ball rolling. Our next stop is City Council to approve our zone change. Have not yet heard that that's been scheduled but would like to get it on my side's calendars soon. Also do not have the text of the decision by the Planning Board recommending the zone change.

Our P&S on the Barracks building calls for a current expiration date of Aug 1 (Aug 1, 2009 re the Hospital). We're going to be nowhere near having our City permits in hand by then, much less our construction loan lined up. We need to extend those expiration dates for sufficient time to reasonably reflect the process that is actually underway. I'd recommend June 1, 2009. We really need this to support our continuing efforts to achieve all of the permits now deemed required.

Please get back to me. I envision the text of this to replicate what we did with respect to the first extension-
Ron

Ronald N. Ward, Esq.
Drummond Woodsum & MacMahon
PO Box 9781
245 Commercial Street
Portland, ME 04104

207-772-1941
207-772-3627 (fax)
rward@dwmlaw.com

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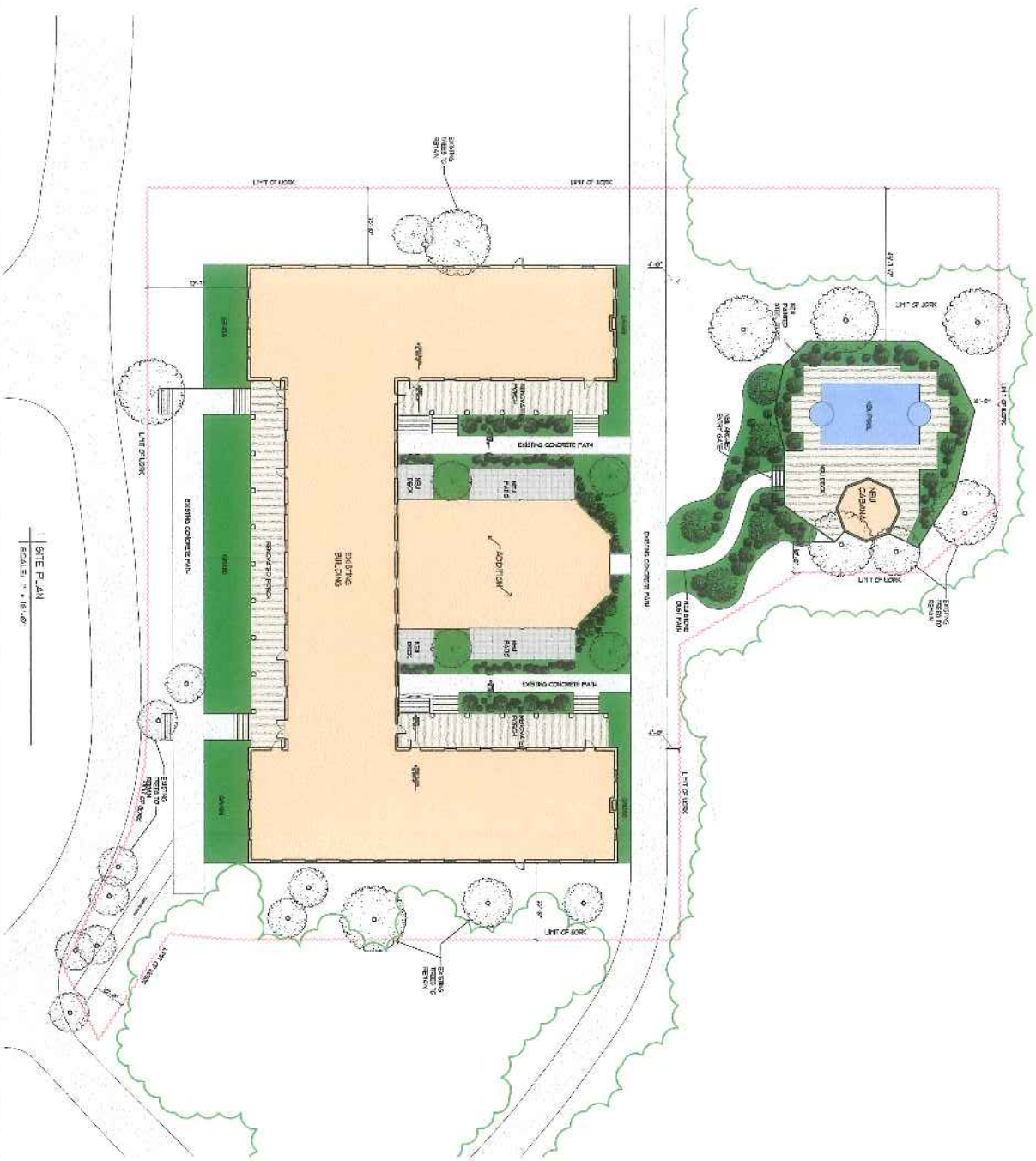
From: "David Lloyd" <lloyd@archetypepepa.com>
To: "Alex Jaegerman" <AQJ@portlandmaine.gov>, "Rick Knowland" <RWK@por...>
Date: 6/25/2008 1:12 PM
Subject: FW: Great Diamond site
Attachments: 11x17 A-0.10 - Site Plan.dwg A-0.pdf

FYI

David Lloyd
Archetype, P.A.
48 Union Wharf
Portland, ME 04101
Phone: (207) 772-6022
Fax: (207) 772-4056
lloyd@archetypepepa.com
<http://www.archetype-architects.com> <<http://www.archetype-architects.com/>>

From: David Hickman [mailto:hickman@archetypepepa.com]
Sent: Wednesday, June 25, 2008 12:59 PM
To: David Lloyd
Subject: Great Diamond site

David Hickman
Archetype, P.A.
48 Union Wharf
Portland, ME 04101
Phone: (207) 772-6022
Fax: (207) 772-4056
Hickman@archetypepepa.com
<<http://www.archetype-architects.com/>> <http://www.archetype-architects.com>



SITE PLAN
SCALE: 1" = 15'-0"



A-0.10	NOT FOR CONSTRUCTION	Date: -	Scale: 1/8" = 1'-0"	Project: THE INN AT DIAMOND COVE, LLC <small>Mckinley C., Choc Diamond Island, Maine</small>	Architect: ARCHETYPE ARCHITECTS, P.A. <small>48 Union Wharf Portland, Maine 04101 (207) 773-6822 Fax: (207) 772-0556</small>	Owner: BATEMAN PARTNERS, LLC <small>245 Commercial Street, Portland, ME 04101</small>
	SITE PLAN	Revised: -				

Alex Jaegerman - The Inn At Diamond Cove, LLC/Great Diamond Island

From: Kathy Larkin <klarkin@dwmlaw.com>
To: "rwk@portlandmaine.gov" <rwk@portlandmaine.gov>, "aqj@portlandmaine.g...
Date: 6/6/2008 12:16 PM
Subject: The Inn At Diamond Cove, LLC/Great Diamond Island
CC: "nathan@batemanpartnersllc.com" <nathan@batemanpartnersllc.com>
Attachments: Supplemental Conditions and Restrictions (2).DOC; Draft Conditional Rezoning Amendment with attachments.PDF

Ron Ward asked that I send you the attached Draft Conditional Rezoning Amendment and Supplemental Conditions and Restrictions regarding Ft. McKinley. If you have any problems in opening or reading these attachments, please contact us.

Kathy J. Larkin, Legal Assistant

DrummondWoodsum

245 Commercial Street
Post Office Box 9781
Portland, Maine 04104-5081
207-772-1941
FAX 207-772-3627
klarkin@dwmlaw.com

Any statements in this communication regarding tax matters are not intended or written by us to be used, and may not be used by any recipient of this communication, for the purpose of avoiding penalties that the Internal Revenue Service may seek to impose. The Internal Revenue Service has issued requirements regarding the formality and level of detail required in written analysis to be relied upon to avoid penalties; this communication does not meet those requirements.

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Draft for Portland Planning Board Public Hearing – June 24, 2008

2008

AMENDMENT TO PORTLAND CITY CODE
SECTION 14-49 (ZONING MAP)

RE: CONDITIONAL REZONING OF FT. MCKINLEY

- WHEREAS,** Diamond Cove Homeowner's Associates ("DCHA") is the record owner and manager of certain land situated on the northerly portion of Great Diamond Island within the project commonly known as the Ft. McKinley property; and
- WHEREAS,** in 1985 the Ft. McKinley property was rezoned by the City of Portland through a Conditional Zone Agreement subject to terms and conditions reflected in that document entitled "Conditions and Restrictions" recorded in the Cumberland County Registry of Deeds in Book 8928, Page 264, a copy of which is attached hereto as Attachment 1; and
- WHEREAS,** on August 16, 2004, the Ft. McKinley Conditional Zone Agreement was first amended to further limit the use of motor vehicles at Ft. McKinley; attached hereto as Attachment 2 is a copy of the City Council's Order and, as Attachment 3, the Conditions referenced in that Order; and
- WHEREAS,** The Inn at Diamond Cove, LLC has requested, with the prior consent of DCHA, a second amendment to the Conditional Rezoning Agreement to allow for its renovation and reuse of two buildings on the Ft. McKinley property, namely the Double Barracks (Building 46) and the Hospital (Building 19), together with the service area located on the designated Open Space, consistent with the terms and conditions referenced herein; and
- WHEREAS,** the Planning Board, pursuant to 30-A M.R.S.A. Section 4352, after notice and hearing and due deliberation thereon, recommended amending the Conditional Rezoning Agreement subject to the terms and conditions contained and referenced herein; and
- WHEREAS,** the City Council hereby finds and declares that said amendment would be pursuant to and consistent with the City's comprehensive plan and would satisfy the guidelines set forth in Section 14-145.13 of the Portland City Code, for all of the reasons contained in the Planning Board's Report accompanying this Amendment;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PORTLAND, MAINE, IN THE CITY COUNCIL, ASSEMBLED, AS FOLLOWS:

THAT, the Zoning Map of the City of Portland, Maine (1958), as amended, on file in the Office of the Director of Planning and Urban Development (incorporated into this code by Section 14-49) and partially depicted below, governs said redevelopment of Buildings 46 and 19, and the related service area, and, as amended, continues to govern the Ft. McKinley Project as shown on the attached fragmentary map entitled "Ft. McKinley Property Zoning Map (Great Diamond Island)", subject, however, to the 1985 Conditions and Restrictions as they have been previously amended, and the Supplement thereto applicable to said redevelopment of Buildings 46 and 19, attached.

INSERT MAP

ATTACHMENT 1

BK 8928 PG 1263

7/15/86

City of Portland, Maine

BY THE CITY COUNCIL

046089

AMENDMENT TO PORTLAND CITY CODE
SECTION 14-49 (ZONING MAP)

RE: CONDITIONAL REZONING OF FT. MCKINLEY

- WHEREAS, Diamond Cove Associates is the record owner of certain land, with the buildings thereon, situated on the northerly portion of Great Diamond Island and commonly known as the Ft. McKinley property; and
- WHEREAS, in the process of a comprehensive land use study and rezoning of the Portland Islands by the City, Diamond Cove Associates requested that a portion of said property be rezoned from the R-2 Residential Zone to the IR-3 Island Residential Zone; and
- WHEREAS, the Planning Board, pursuant to 30 M.R.S.A. Section 4962(1)(I), and after notice and hearing and due deliberation thereon, recommended rezoning a portion of the property as aforesaid, subject, however, to certain conditions; and
- WHEREAS, the City Council hereby finds and declares that said conditional rezoning would be pursuant to and consistent with the City's comprehensive plan and would satisfy the guidelines set forth in Section 14-145.13 of the Portland City Code, all for the reasons contained in the Planning Board's report accompanying this Amendment;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PORTLAND, MAINE, IN THE CITY COUNCIL ASSEMBLED, AS FOLLOWS:

THAT, the Zoning Map of the City of Portland, Maine (1958), as amended, on file in the Office of the Director of Planning and Urban Development (incorporated into this code by Section 14-49) be further amended as shown on the attached fragmentary map entitled "Fort McKinley Property Zoning Map (Great Diamond Island)", subject, however, to the Conditions and Restrictions attached hereto.

CONDITIONS AND RESTRICTIONS

The following conditions and restrictions are imposed by the City of Portland (the City) on Diamond Cove Associates (the Owner) as conditions of the rezoning of the property described on the map attached hereto (the Premises) from the R-2 Residential Zone to the IR-3 Island Residential Zone:

1. Development limited. The development, use and occupancy of the Premises shall be limited to one hundred thirty-four (134) dwelling units and other permitted uses, and uses accessory thereto. Except for the reconstruction, renovation and repair of existing buildings and structures, and the construction of minor additions and improvements thereto, there shall be no construction or development of any new principal building or structure on the Premises. All portions of the Premises identified on the map attached hereto as open space shall be dedicated and reserved as such in perpetuity.

2. Completion of development. The development of the Premises as aforesaid shall be substantially completed within three (3) years after the issuance of all licenses, permits and approvals required and requiring final action by any administrative agency, board or commission, including but not limited to subdivision, site plan and site location of development approvals, but not including building, plumbing, electrical or similar permits, which licenses, permits and approvals shall hereafter be diligently pursued; provided, however, that the time for performance hereunder shall be extended for the time during which performance is delayed by reasons wholly beyond the Owner's control, including but not limited to strikes, lock-outs, labor disputes, inability to procure materials, failure of power, riots, war, insurrection, administrative or judicial delay and similar reasons, but not including financial hardship or business conditions; provided, further, that the Planning Board may, after notice and hearing, extend the time for performance hereunder for up to one (1) additional year if it finds that substantial progress has been made toward completion, and that there is a reasonable likelihood of substantial completion within the time as extended.

3. Maintenance of streets, walks and landings. All streets and ways, walks and pedestrian rights of way, and landings, floats and docks on the Premises, including but not limited to those to which the public has a right of access, shall be kept reasonably safe and passable at all times, including but not limited to the off-season or winter months, and at the Owner's expense; provided, however, that the City may, from time to time, designate such areas as need not be kept clear of ice and snow when or where, in its opinion, the public health, safety and welfare do not require it; provided, further, that in the event that the Owner fails to perform any obligation hereunder, the City may, after giving actual notice to the Owner and a reasonable time to perform, enter upon the Premises, or any portion thereof, and take such reasonable steps, including

but not limited to the exercise of self-help, as to it may seem necessary or appropriate to perform the same, the cost of which shall be reimbursed in full by the Owner upon demand.

4. Maintenance of utilities. All utilities and related infrastructure and improvements on the Premises, including but not limited to water, power, communications, sewers and drains, surface drainage ways, street lights and hydrants, shall be kept fully operational and in good repair at all times, including but not limited to the off-season or winter months, and at the Owner's expense; provided, however, that in the event that the Owner fails to perform any obligation hereunder, the City may, after giving actual notice to the Owner and a reasonable time to perform, enter upon the Premises, or any portion thereof, and take such reasonable steps, including but not limited to the exercise of self-help, as to it may seem necessary or appropriate to perform the same, the cost of which shall be reimbursed in full by the Owner upon demand.

5. Disposal of sanitary waste. All sanitary waste generated on the Premises shall be collected and disposed of on the Premises by means of a community sewer and secondary treatment system which complies with all applicable federal, state and local regulations, and at the Owner's expense.

6. Disposal of solid waste. All solid waste generated on the Premises shall be collected and disposed of on the mainland or if, in the City's opinion, it would not create an unreasonable burden thereon, at a municipally-operated island solid waste disposal facility, in a manner which meets all applicable federal, state and local requirements, and at the Owner's expense.

7. Fire protection, public safety and emergency services. Before occupancy of the Premises, or any portion thereof, the Owner shall, at its own expense, provide to the City:

- (a) a fully equipped "Quint truck", so-called, or its equivalent, for fire protection purposes, which vehicle, whether new or used, shall conform to City specifications and be leased to the City under a written net lease-purchase agreement in a form mutually satisfactory to the parties and upon commercially reasonable terms, at the end of which lease term title to said vehicle shall be transferred to the City free and clear of all liens and encumbrances, and at no additional charge;
- (b) a fully equipped multi-purpose truck van, for public safety and emergency purposes, which vehicle, whether new or used, shall conform to City specifications and be leased to the City for its useful life under a written net lease agreement in a form mutually satisfactory to the parties and providing for, among other things, annual lease payments in the amount of one dollar (\$1.00); and

- (c) a building or buildings, or portions thereof, suitably located on the Premises, for permanent maintenance and storage of said vehicles and related apparatus and equipment, and housing of at least two (2) City personnel associated therewith, which facility shall conform to City specifications and be leased to the City under a ninety-nine (99) year written net lease agreement in a form mutually satisfactory to the parties and providing for, among other things, annual lease payments in the amount of one dollar (\$1.00), and delivery of possession on a "turn-key" basis.

Upon the City's occupancy of said facility, the Owner shall, at its own expense, provide at all times thereafter a number, not to exceed two (2), of qualified private personnel equal to the number of City personnel then assigned thereto, which private personnel shall be on the Premises and available at all times on an on-call basis to assist said City personnel in the rendering of fire protection, public safety and emergency services on or to the Premises; provided, however, that nothing herein shall constitute any representation or commitment by the City to provide any particular level of staffing or services. Said private personnel shall be trained and equipped for such purposes by the City and at its expense, and shall be under the direction and supervision of authorized City personnel at all times while so engaged; provided, however, that in no case shall said private personnel be deemed agents or employees of the City for any purpose, including but not limited to workers' compensation, unemployment compensation, tort claims liability and collective bargaining; provided, further, that notwithstanding the foregoing, in the event that the City is held liable for any claim arising out of or relating to any actions of said private personnel, which actions were not pursuant to and consistent with the directions of authorized City personnel, the Owner shall indemnify and save forever harmless the City from and against any and all such claims.

8. Water transportation service. The Owner shall use its best efforts to secure from the Casco Bay Island Transit District year-round common carrier water transportation service to, from and between the Portland waterfront and Diamond Cove via a suitable docking facility on the Premises and on a schedule to be established by the carrier based upon passenger demand; provided, however, that in the event that such service is or at any time becomes unavailable, the Owner shall, at its own expense, provide an equivalent alternative to such service, subject only to the approval thereof by the Public Utilities Commission, or such other regulatory authority having jurisdiction thereof.

9. Restrictions on motor vehicles. Except for vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers, and fire protection, public safety and emergency vehicles, no motor vehicles, as defined in 24 M.R.S.A. Section 1(7), but including snowmobiles, shall be operated or stored, temporarily or otherwise, on the Premises.

10. Applicability of other laws. The development, use and occupancy of the Premises shall be subject to all other applicable laws, ordinances, regulations and requirements of the City as they may from time to time exist, and neither these conditions or restrictions nor the performance of any obligation hereunder shall constitute compliance therewith or prevent the enforcement thereof, any violation of which shall also constitute a breach of these conditions and restrictions, any breach of which shall also constitute a violation of Chapter 14, Article III (Zoning) of the Portland City Code.

11. Successors bound. These conditions and restrictions shall bind the Owner, its successors and assigns, of or to the Premises, or any portion thereof or any interest therein, including but not limited to any security interest, and any person in possession or occupancy of the Premises, or any portion thereof, and shall inure to the benefit of and be enforceable by the City. The Owner shall, at its own expense, record a copy of these conditions and restrictions in the Cumberland County Registry of Deeds, and shall, by deed, covenant, declaration of condominium or other recorded or recordable instruments, as appropriate, ensure that these conditions and restrictions are enforceable by the City against all such successors, assigns and persons. Nothing herein shall be deemed to limit the Owner's right of alienability of the Premises, or any portion thereof, subject to these conditions and restrictions, which conditions and restrictions shall run with the land and be binding upon the Owner, its successors and assigns, as their interests may appear.

12. No reliance or estoppel. Nothing in these conditions or restrictions shall constitute any representation or commitment by the City to retain the zoning classification of the Premises, or shall entitle the Owner to rely thereon for any purpose, or shall estop the City from any future rezoning or exercise of other authority with respect to the Premises. Nothing herein shall be deemed to preclude the Owner from petitioning the City for any future rezoning of the Premises or other property in the vicinity thereof; provided, however, that nothing herein shall constitute any representation or commitment by the City to grant such a petition or otherwise act thereon.

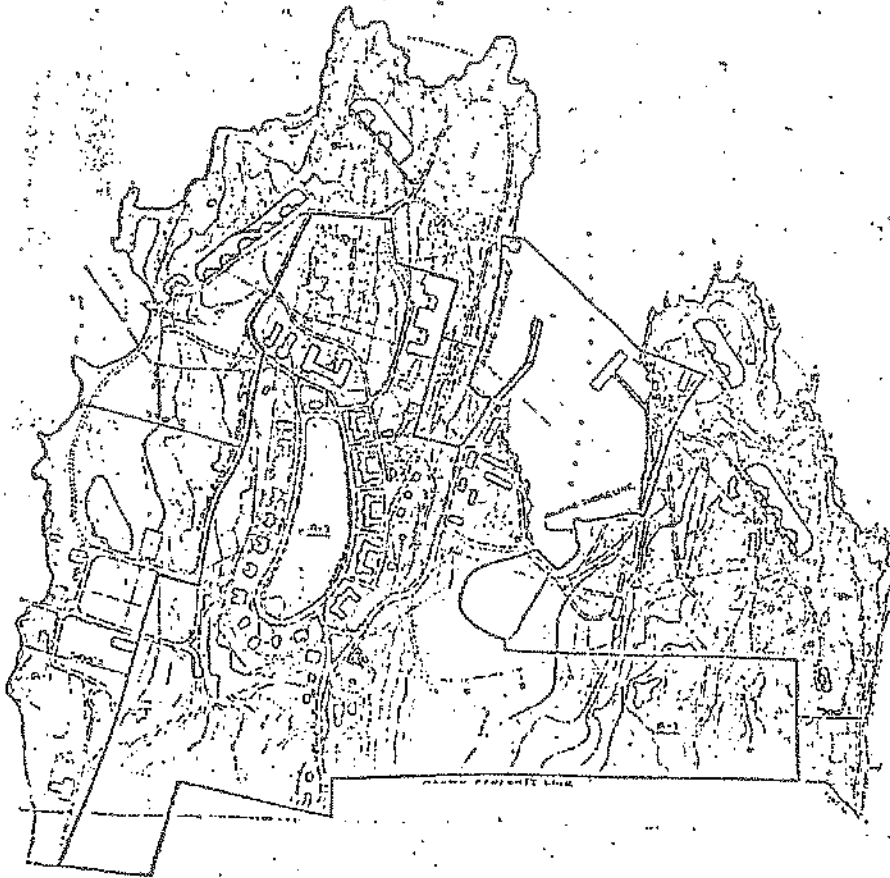
13. Breach. In case of any breach of these conditions and restrictions, and except as otherwise hereinbefore provided, the City shall, after giving written notice to the Owner and a reasonable time to cure not to exceed six (6) months, refer the same to the Planning Board, which shall, after notice and hearing, make a recommendation to the City Council whether to rezone the Premises, or any portion thereof, which recommendation shall be advisory only.

14. Declaration of invalidity. In the event that these conditions and restrictions, or any portion thereof, are declared invalid for any reason by a court of competent jurisdiction, the City shall invoke the same procedure as hereinbefore provided for breach of these conditions and restrictions.

15. Remedies not impaired. No failure or delay by the City to enforce any of these conditions and restrictions shall impair any remedy available for breach hereof, or constitute a waiver of or acquiescence in any breach hereof, the remedies for which shall be cumulative.

7/15/83

FORT MCKINLEY PROPERTY ZONING MAP
(GREAT DIAMOND ISLAND)



NOTE: SHORELAND ZONE LINE EXTENDS INLAND A DISTANCE
OF 250 FEET FROM THE NORMAL HIGH WATER MARK
OF THE BAYS, COVES, SOUNDS, INLETS AND OPEN
WATERS OF CASCO BAY.
(48)

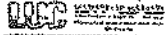
BK8928PG0270

7/15/85

Diamond Cove

GREAT DIAMOND ISLAND
DEVELOPER: DICTAR ASSOCIATES

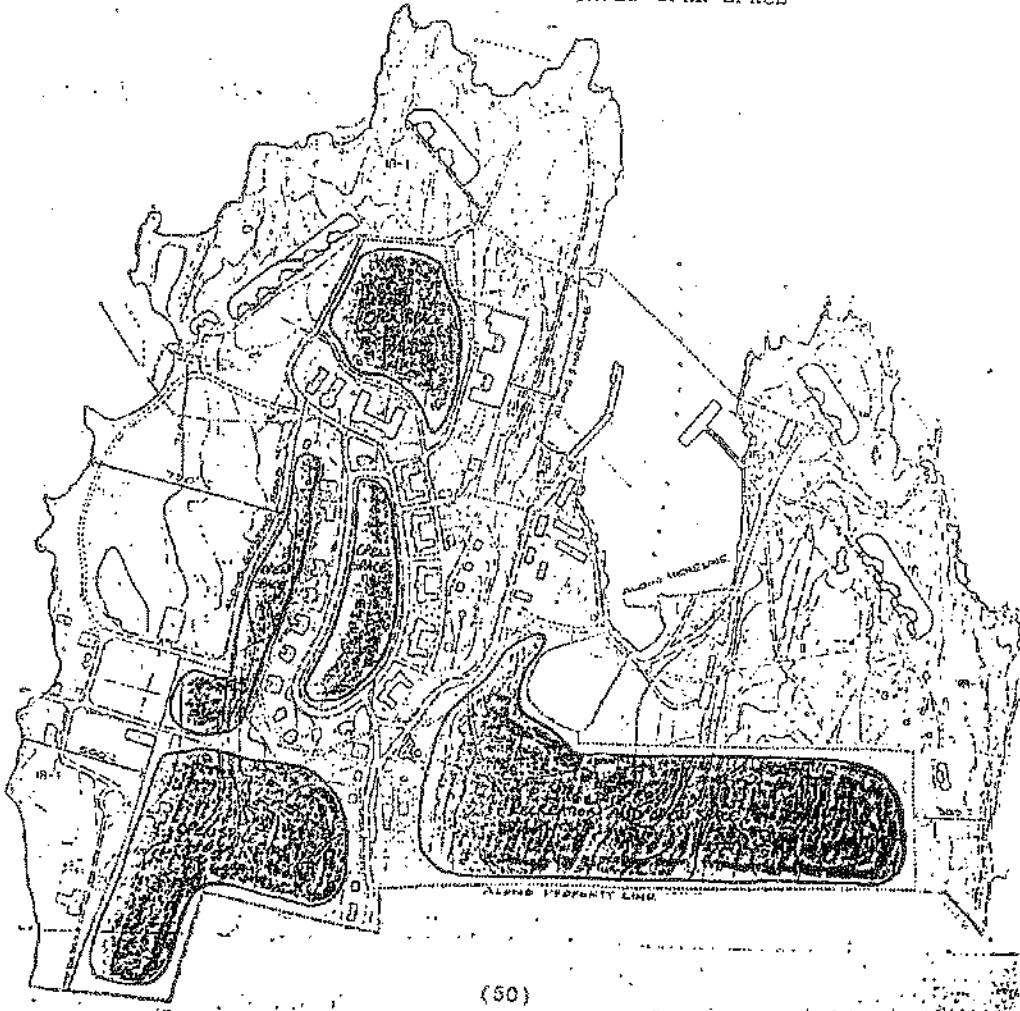
PORTLAND, MAINE
PORTLAND, MAINE



Department of Environmental Protection
Planning, Policy, Programs and Compliance



DEDICATED OPEN SPACE



(50)

AMENDMENT TO WOLFLEIGH CITY
CODE SECTION 14-49 (ZONING
MAP) SECTION 14-49 (ZONING
MAP) RE: CONSTITUTIONAL
REZONING OF FT. WOLFLEIGH

BY THE CITY COUNCIL

JUNE 12, 1985

Given a first reading. Public hearing held.

JUNE 24 - Public hearing held. Councilor Smith moved, seconded MacMillans to table to July 15th afternoon City Council Meeting, passed 7 yeas.

JULY 15 - Removed from the table. Motion to replace with substitute amendment, passed, 8 Yeas, and passed, as amended, 8 Yeas.

Item #30 dated July 15, 1985 is relevant to this item. Titled Motion For-Island Sub-division, it refers to this item.

Jane Durgin
SEAL

Janet Kelly
SEAL
City Clerk

STATE OF MAINE
CUMBERLAND, SS.
January 27, 1986

Personally appeared the above-named Jane Durgin and acknowledged the foregoing instrument to be her free act and deed in her said capacity.

EMILIE CORSON

Emilie Corson
Notary Public
Comm. Exp. 11-16-88

RECEIVED
CLERK OF COURTS
1985 SEP 28 PM 3:32
CUMBERLAND COUNTY

[Signature]

Order 33-04/05
Given first reading: 8/2/04
Amended and Passed: 8/16/04 6-0 (Geraghty, O'Donnell, Cohen absent)

**AMENDMENT TO CONDITIONAL ZONE AGREEMENT
REFERENCED IN ORDER 42-84/85
RE: CONTRACT FOR REZONING FOR PROPERTY
IN THE VICINITY OF
DIAMOND COVE/GREAT DIAMOND ISLAND**

WHEREAS, on July 15, 1985, the Portland City Council approved a Conditional Rezoning of property located on Great Diamond Island, formerly known as Fort McKinley (hereinafter sometimes referred to as the "Site");

WHEREAS, on May 18, 2004, the Diamond Cove Homeowner's Association filed an application to amend the Conditional Rezoning to allow electric golf carts to be operate exclusively within the Site;

WHEREAS, on July 20, 2004, the Portland Planning Board recommended the approval of the amendment to the Conditional Rezoning conditioned on some further limitations with regard to number of allowed golf carts and further provisions regarding enforcement; and

WHEREAS, the City Council hereby finds and declares that the said amendments to the Contract Rezoning would be pursuant to and consistent with the City's Comprehensive Plan;

NOW THEREFORE, BE IT ORDAINED by the City Council of the City of Portland, Maine, in the Council assembled, as follows:

Section 9 and Section 13 of the Contract Zone Agreement in Order 42-84/85 is hereby amended as follows:

Section 9: Restrictions on motor vehicles. Except for vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers and fire protection, public safety and emergency vehicles, no motor vehicles, as defined in 29-A M.R.S.A. Section 101(42), but including snowmobiles and all-terrain vehicles, shall be operated or stored, temporarily or otherwise, on the Premises; provided that nothing contained herein shall be deemed to restrict electrically powered golf carts, neighborhood electrical vehicles, electric personal assistive mobility devices (a/k/a human transporters), low-speed vehicles as currently defined in 29-A M.R.S.A. Section 101, or any similar vehicles.

Each unit is entitled to one vehicle (i.e. electrically powered golf cart, neighborhood electrical vehicle, electric personal assistive mobility device [a/k/a human transporter], low-speed vehicle as currently defined in 29-A M.R.S.A. Section 101, or any similar vehicle) but in any event, the total number of such vehicles on the Site shall not exceed eighty-two (82).

Within sixty (60) days of approval of this amendment by the Portland City Council, Diamond Cove Homeowners Association shall file a transportation management plan with the City's Planning Authority that includes but is not limited to a description of the process for allocating vehicle permits; a description of the means and methods of providing transportation for the disabled on the island; a restriction that confines permitted vehicles to established roadways that are presently within the Association property; a description of available common transportation service vehicles and how they will be managed for the needs of residents and visitors; and a description of how construction, supply-delivery and service vehicles from outside the island including barge ingress and egress routes to the island are managed.

This paragraph is otherwise governed by the terms and conditions contained within the attached document entitled "Conditions Restricting Use of Diamond Cove Motor Vehicles Outside of Diamond Cove" which document is incorporated by reference.

13. Breach. In the event DCHA or any successor should fail to utilize the **PROPERTY** in accordance with this Agreement, or in the event of DCHA's breach of any condition(s) set forth in this Agreement which differs from the provisions of Portland's Land Use Code which would otherwise be applicable to property situated in the IR-3 zone, the **CITY** may prosecute such violations in accordance with 30-A M.R.S.A. § 4452, M.R.Civ.P. 80K, or in any other manner available by law and seek the remedies authorized by that law.

In addition, if such enforcement action should result in a finding that DCHA has breached the Agreement, then either the Portland Planning Board, or at the request of the Planning Authority, or the City Council on its own initiative, may act either to modify the Agreement or to rezone the **PROPERTY**.

ATTACHMENT _____
Conditions Restricting Use of Diamond Cove Motor Vehicles
Outside of Diamond Cove

1. No vehicle shall pass from Diamond Cove to the southerly part of Great Diamond Island, except as permitted herein. **DCHA** will take the following steps to enforce the existing restrictions on motor vehicle traffic entering or exiting the southerly boundary of the Diamond Cove property:
 - (a) **DCHA** will immediately close and lock the so-called “lower gate” at the Diamond Cove property line on West Shore Drive, to prohibit vehicular traffic from entering or exiting through this gate. **DCHA** will place a means to open this gate with first responders on the island, selected fire company officers, and the fire truck and ambulance to ensure that the gate can be opened quickly in an emergency. Said means will be subject to the approval of the Portland Fire Chief or his designee. **DCHA** will also provide the City’s Department of Public Works with a means to open this gate for the purpose of accessing any facility within the Diamond Cove property used by DPW pursuant to an agreement with **DCHA**.
 - (b) **DCHA** will secure the so-called “upper gate” on Diamond Avenue in the same manner as the lower gate.. Only a pedestrian access gate shall remain permanently open.
 - (c) Only vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers, and fire protection, public safety and emergency vehicles, (hereinafter sometimes referred to as “Exempted Vehicles”) will be provided by **DCHA** with the means to open the lower gate and/or the upper gate and only these vehicles may pass to the southerly part of Great Diamond Island. **DCHA** will arrange to open the lower gate for these vehicles in order to use the barge landing on **DCHA** property from which these vehicles may pass to and from the southerly part of Great Diamond Island or remain within the Cove pursuant to Cove regulations.
 - (d) **DCHA** will institute a registration and approval process for Exempted Vehicles that are permitted to open the lower gate and/or the upper gate and exit the southerly boundary of the Diamond Cove property. Vehicles approved by **DCHA** must also be approved by the City Office of Code Enforcement. If **DCHA** determines that an application meets the definition of Exempted Vehicles set forth in Section 1(c) above, then

DCHA may provide the operator with a key and a prominent exemption decal provided by the City shall be placed on the vehicle. Any such operator will be required to sign a statement (a) agreeing that the key would be used only with the specified vehicle and only for the specified exempted purpose, and (b) acknowledging the right of **DCHA** and the City to impose fines and to revoke gate privileges for violations of the foregoing use restrictions. **DCHA** will identify any such approved operator/vehicle on a list of exemptions to be kept on file at the office of the Diamond Cove site manager (currently Dirigo Management Company, One City Center, 4th Floor, Portland, Maine), which list and any amendments thereto shall also be provided to the City's Office of Code Enforcement.

- (e) Notwithstanding any other state or local law, any non-exempted vehicle must be annually registered with the City and must display in a clearly visible manner a license plate provided by the City with a clearly visible number in the same manner and location required by State law for license plates on motor vehicles. **DCHA** shall provide the City with a list containing the names and addresses of the registered owner of each such vehicle and the license plate number of the vehicle within thirty (30) days of the date upon which the Council approves the amendment to allow golf carts in the IR-3 zone and within ten (10) days for any subsequently registered vehicles.
- (f) **DCHA** will levy fines for violations of the foregoing restrictions, consistent with the Diamond Cove Declaration, in cases when an operator of a motorized vehicle of any kind (including golf carts and electric personal assistive mobility devices, a/k/a human transporters) is found to pass south of the southerly boundary of the Diamond Cove property for any purpose other than those set forth for Exempted Vehicles. In the event of apparent violations, the site manager will be directed to send a letter identifying the date and time in question to the holder of the key and notify the City. The holder of the key will have the opportunity to respond to explain the circumstances of the boundary crossing. Non-conforming crossing of the gate would result in a penalty, imposed by the **DCHA** Board on the holder of the key. Initially, penalties would be as follows: First offense – \$50 fine; second offense – \$100 fine; third offense – \$200 fine and revocation of crossing privileges. Nothing in this paragraph shall be construed or applied to prevent the City from bringing separate enforcement actions for violations.
- (g) Any other language in this contract zone agreement notwithstanding such violations may, in the City's discretion, be prosecuted as Land Use violations pursuant to 30-A M.R.S.A. § 4452 and Rule 80K of the Maine Rules of Civil Procedure. In all cases the registered owner of a non-exempted vehicle shall be

liable for any violations and sanctions unless the registered owner provides clear and convincing evidence showing that the use at the time of the violation was unauthorized by him or her.

(h) **DCHA** will immediately provide notice to all of its members of the foregoing policies and procedures.

2. Nothing contained herein shall be deemed to grant any third party rights. Without limiting the generality of the foregoing, nothing contained herein shall be deemed to entitle any third party with the means of opening either the upper gate or the lower gate without **DCHA** approval.

**SUPPLEMENTAL CONDITIONS AND RESTRICTIONS
BUILDINGS 46 (“DOUBLE BARRACKS”) AND 19 (“HOSPITAL”)
FT. MCKINLEY, PORTLAND, MAINE
JUNE _____, 2008**

The following supplemental conditions and restrictions are imposed by the City of Portland (the “City”) on that portion of the Ft. McKinley project (“Project”) commonly known as Buildings 46 and 19, together with the ancillary service area, all as depicted on the map attached hereto as Attachment 1 (“Premises”), as conditions of the rezoning of the Premises at the request of The Inn At Diamond Cove, LLC (“IDC”), and consented to by the Diamond Cove Homeowners Association (“DCHA”):

1. Existing Conditions. The Premises are a portion of the development commonly known as Ft. McKinley, Great Diamond Island, Portland, Maine which is subject, inter alia, to those Conditions and Restrictions recorded in the Cumberland County Registry of Deeds in Book 8928, Page 263, as amended by Order of the Portland City Council on August 16, 2004 relating to ground transportation in and around the Project (collectively, the “Existing Conditions and Restrictions”).

2. Supplemental Conditions and Restrictions. Notwithstanding the terms of the IR-3 zoning text otherwise applicable to the Premises, and the Existing Conditions and Restrictions, those buildings designated as Building 19 (“Hospital”) and Building 46 (“Double Barracks”), the immediate grounds attendant thereto and a portion of the Open Space, all depicted on the site plans dated June _____, 2008, all may be redeveloped into individually owned and fully equipped condominium units, sometimes known as “hotelominiums” and a supporting pool/services area on the Open Space. “Hotelominium” is defined as privately owned residential condominium units (with kitchens) located within a structure that offers reasonable and customary on-site hotel services which are limited to the unit owners, their guests, tenants in residence and members of the DCHA. The Hotelominium units may be rented (in whole or in part by virtue of attached bedrooms capable of being independently rented through a “lock out” system from the remainder of the unit) for varying durations to the general public through a centralized hospitality vendor. The Double Barracks may include up to a maximum of twenty (20) hotelominium units and the Hospital may include up to a maximum of twelve (12) hotelominium units. The units contained within the Double Barracks and the Hospital buildings shall become members of a separate condominium association established for these two rehabilitated buildings, and each unit will also be considered a “lot” within DCHA, subject to all of the applicable restrictions, covenants, conditions, assessments and the like of both DCHA and the newly-established condominium association.

The lots (individual residences) which have been renovated and for which a certificate of occupancy has been issued by the City are depicted on Attachment __; the Double Barracks and the Hospital, both of which may be renovated, are depicted on Attachment __. The approved rehabilitation may include construction of a new

swimming pool and related guest services building on that portion of the Open Space depicted on the site plans, a copy of the relevant portion of which appears as Attachment _____ hereto. The recording of the within Amendment shall be deemed to supplement the Conditions and Restrictions recorded in Book 8928, Page 263 and the "Dedicated Open Space Plan" attached thereto as an Exhibit.

3. Disposal of Solid Waste. All solid waste generated on the Premises shall be collected and disposed of privately, with temporary storage of such waste being handled within the building and disposed of in accordance with all applicable regulations, codes and laws; provided, however, that the Premises shall not be precluded from making arrangements with the City of Portland or other public entity for the storage and disposal of its solid waste.

4. Fire Protection. The Double Barracks and Hospital buildings shall be fully sprinkled and have installed, and at all times functional, a fire alarm system operative prior to the issuance of any certificate of occupancy for the respective building.

5. Transportation Services. The Owner/Manager of the Premises shall use its best efforts to secure from the Casco Bay Island Transit District year-round common carrier water transportation service to, from and between the Portland waterfront and the Diamond Cove Pier (or barge landing where appropriate for passengers and/or cargo) on a schedule to be established by the carrier based upon passenger demand; provided, however, that in the event that such service becomes unavailable, the Owner/Manager shall provide an equivalent alternative to such service, subject only to the approval thereof by the Public Utilities Commission, or such other regulatory authority having jurisdiction thereof. The Owner/Manager shall also provide suitable ground transportation from points of disembarkment within the Project to the hotelominiums. The Owner/Manager shall not provide motorized ground transportation off the Ft. McKinley Project site and all such transportation shall strictly conform to all existing ordinances, rules and regulations concerning travel outside of the Project site to the public pier at the southerly end of Great Diamond Island. All purchasers of units at the Premises shall receive specific notice of the applicable rules and regulations, including the potential sanctions for failure to comply.

6. Interpretation; Conflicts. The within conditions and restrictions are intended to supplement the existing Conditions and Restrictions and amendments thereto, all of which shall remain in full force and effect except as modified herein or as may be modified by further amendment or ordinance duly enacted by the City of Portland. In the event of any conflict between these Supplemental Conditions and Restrictions and the pre-existing Conditions and Restrictions, as amended, these Supplemental Conditions and Restrictions shall control.

Alex Jaegerman - Inn At DC

From: Ronald Ward <rnw@dwmlaw.com>
To: "Penny Littell " <PL@portlandmaine.gov>, "Alex Jaegerman " <AQJ@portland...
Date: 6/5/2008 5:10 PM
Subject: Inn At DC
CC: Nathan Bateman <nathan@batemanpartnersllc.com>, Kathy Larkin <klarkin@dw...

The redrafting of the Zoning Amendment document and Supplemental Conditions and Restrictions will be complete tomorrow and I'll then forward the drafts to your for review. When you're ready, we can sit down and discuss the form and the substance. The following is a heads up to give you a jump start on reviewing those documents:

You'll receive the documents in a clean, final format. Trying to black line what I received which was also black lined makes the document difficult to read and interpret. We'll black line the next versions.

You'll receive 2 documents tomorrow, one the text of the Zoning Amendment and the other a Supplemental Conditions And Restrictions. As an initial matter, I'm only aware of one Amendment to the C&R document, that being the 2004 Order relating to golf cart wars. So the current effort would be the 2d Amendment. There have been interim Amendments to the General Declaration by the developer, but those would not be relevant to the zoning document. If there other formal City Council amendments that I'm not aware of, we can add those. That Amendment document will serve to bring the record current on what the formal amendments have been.

The 2d document is the Supplemental C & R. Trying to fold into the historic document what's relevant to the current application is extremely difficult and confusing. I think much clearer and usable to simply create the Supplement which is project- specific. I've made changes therein which are more than just form that you'll want to consider, primarily the following:

The initial draft referenced a zoning interpretation that through lock- outs, the # of units for the Double Barracks is 34. I don't know where that interpretation comes from (for zoning purposes, it may be correct) but it will tend to confuse the issue on the more important issues of DCHA approval and assessments. DCHA, following a formal vote last summer, approved up to 22 units in Building 46. References to 34 units is misleading. Further, the understanding is that the DCHA and condo assessments will be based upon the # of units regardless of lock-out capacity. After all, the units need not be rented, can be used by the owner (or renter) as a contiguous whole or need not be used at all. It is unworkable for a unit to be considered something between 1- 4 units, for example.

The zoning interpretation may be correct, but it need not be stated in the Conditions to be binding. The City is not imperiled by not making this reference.

Wastewater- not dealt with. The original C&R accurately state the obligation and we'll either convince DEP that we're correct for our site plan approval, or we have no chance of convincing the City. That evaluation will be made on the basis of # of bedrooms which is not affected by the lockout arrangement.

Solid waste- we don't know where that will end up, now or later, so I've built in flexibility.

Transportation- our Project will direct all water transportation to our end of the Island. When there, we expect our common carrier to provide the transportation to and from the units. All our unit owners, guests, etc will be apprised of the restrictions on motor vehicle traffic. Having said that, we are obliged to be members of DCHA and to pay for that privilege. It is unworkable and unjustified to penalize these unit owners if they comply with the DCHA rules, as they may be further amended.

Finally- I'm aware that the Planning Board asked for an "updated document". If they'd reflected upon that, they probably would not have asked. Occurs to me that one could annotate the original C&R document to provide ready reference to what has changed, either by formal Council action or otherwise. If, after you read what I forward tomorrow, you want me to take a hack at that, I'll do so. My only reservation is that I've been off the

Island for at least the last 5 years and may not know all that has happened.

Best- Ron

Ronald N. Ward, Esq.
Drummond Woodsum & MacMahon
PO Box 9781
245 Commercial Street
Portland, ME 04104

207-772-1941
207-772-3627 (fax)
rward@dwmlaw.com

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From: Ronald Ward <rnw@dwmlaw.com>
To: 'Alex Jaegerman ' <AQJ@portlandmaine.gov>
CC: "Rick Knowland " <RWK@portlandmaine.gov>
Date: 6/4/2008 1:29 PM
Subject: RE: Re: Inn At Diamond Cove

Rick did leave a message for me. Thanks to all.

Ronald N. Ward, Esq.
Drummond Woodsum & MacMahon
PO Box 9781
245 Commercial Street
Portland, ME 04104

207-772-1941
207-772-3627 (fax)
rnw@dwmlaw.com

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-----Original Message-----

From: Alex Jaegerman [mailto: AQJ@portlandmaine.gov]
Sent: Wednesday, June 04, 2008 1:18 PM
To: Ronald Ward
Cc: Rick Knowland
Subject: RE: Re: Inn At Diamond Cove

Hi Ron. I'll have to look up the rogue table/text item to see what you are referring to. I did note that one of the proposed clauses about access is not in the text version I sent you, but we can talk more about that when we meet.

On the 127 Marginal Way, Rick and I just met and discussed your letter.

We are disposed to agree with your case statement. We are meeting with Marge this afternoon to confirm that this is a reasonable interpretation, since it is a zoning question.

I have a call in to you on this, but no need to return. I'll try to get back to you later this afternoon, or Rick will.

Alex

>>> Ronald Ward <rnw@dwmlaw.com> 6/4/2008 1:06:21 PM >>>
Yes, that's it. I missed your first attempt- thanks.

P.S. This version does not include the rogue table/ text appearing in the staff report, noted earlier. I assume that to be a copying glitch and whatever I send back will not deal directly with that since I think it was a mistake.

Ron

Ronald N. Ward, Esq.
Drummond Woodsum & MacMahon
PO Box 9781
245 Commercial Street
Portland, ME 04104

207-772-1941
207-772-3627 (fax)
rward@dwmlaw.com

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-----Original Message-----

From: Alex Jaegerman [mailto:AQJ@portlandmaine.gov]
Sent: Wednesday, June 04, 2008 12:06 PM
To: Ronald Ward
Cc: Rick Knowland
Subject: Fwd: Re: Inn At Diamond Cove

Ron, I had sent this to you last week. Is this what you need?

Alex.

Alexander Jaegerman, AICP
Planning Division Director
389 Congress Street, Suite 400
Portland, ME 04101

Phone: (207)874-8724

>>> Alex Jaegerman 5/29/2008 5:49:26 PM >>>

Ron: attached is a draft of the Cond's & Restrictions as proposed to be amended, except that the proposed language at the end of paragraph 9 is missing. I don't know if you have this, or if it would be helpful to you for drafting purposes, as we had discussed.

Alex.

Alexander Jaegerman, AICP
Planning Division Director
389 Congress Street, Suite 400
Portland, ME 04101

Phone: (207)874-8724

>>> Ronald Ward <rnw@dwmlaw.com> 5/28/2008 11:07:27 AM >>>

I think the tabling motion was the correct move last night to give us time to focus upon both the formatting and substance of the proposed rezoning document. I take the long view of these things, particularly with this project. Now, 6 months from now, 5 years from now, this needs to be backed up by documents which a disinterested 3rd party (banker, regulatory representative, buyer, etc) can pick up and understand the deal as it applies to these proposed units. I think the current drafts do not yet get us there. It's apparent to me that the request from the Board that it be given a "single, updated document" that brings everything together was hasty and does not properly take into account what a difficult (near impossible) task that is.

We need to keep the momentum going and we'll participate in the redrafting in whatever way will be most efficient. I'm thinking that we all sit down and discuss this after I've been given the relevant documents. I was unaware that the original Conditions And Restrictions had been amended by the Council. That's a recorded document and I asked the title people to tell me if any prior amendments on record and I thought they reported no. Whatever, I need to see the documents now which form the basis for the proposed changes to the original document, not caused by this Project.

The Board needs to understand that this is a complex drafting exercise, much more so than it appears to recognize. We can get there.

Ronald N. Ward, Esq.
Drummond Woodsum & MacMahon
PO Box 9781
245 Commercial Street
Portland, ME 04104

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**QUESTIONS AND ISSUES THAT NEED TO BE ADDRESSED
BY STAFF IN RESPONSE TO INQUIRIES FROM THE COUNCIL
ON THE GREAT DIAMOND COVE HOTELMINIUM PROJECT**

Email To: Penny Littell, Alex Jaegerman, Rick Knowland, Fred LaMontaigne, Joe Loughlin, Ron Ward at Drummond Woodsum, Tony Calcagni at Verrill Dana

Re: Council inquiries or request for information for the October 6th Council meeting regarding Diamond Cove Hotelminium project

I Councilor Mavodones

(1) What is the actual current available capacity at the waste treatment plant inside the Cove (Planning)

(2) Are the restrictions currently contained in the proposed amendments sufficient to ensure that vehicular traffic won't cross the island from the Cove to the public landing? (Planning) NB: Jim Katsialicas has proposed more exacting restrictions that are attached to his letter.

a. Does the developer support or oppose the restrictions as drafted in the proposed amendment? (Ron Ward)

In general, several councilors questioned whether the traffic restriction language in the current proposal is actually sufficient to be binding in a meaningful way on property owners within the Cove and those who will be using the hotelminium.

(3) What will be the impact of the hotelminium on City services: DPS, PFD and PPD? (question posed by several councilors) (Mike Bobinsky, Fred Lamontaigne, Joe Loughlin)

Put another way, would the City need to increase its level of any of the above services if the hotelminium is approved?

(4) Does this proposed amendment constitute spot zoning or is it a conditional zoning amendment that is consistent with the Comprehensive Plan (Site language) and legally defensible? (Penny Littell)

(5) What is the current rental program within Diamond Cove for the existing units? (Attorney Tony Calcagni at Verrill Dana)

(6) Would the proposed bar be allowed under DEP regulations and by the applicable zoning as a permitted use? (Planning)

(7) Is the proposal to eliminate some of the ROS space illegal under the current controls and regulations governing uses and zoning within the Cove? NB Tony Calcagni answered this question: the ROS issue raised by those objecting to the project is not applicable to Phase 1 of the Diamond Cove development, which is the phase that we are still in. The language cited by opponents in 7.3.2 of the declarations in which it is stated that land in an ROS classification shall remain in that classification forever is only applicable to phase 2 of the proposed development.

Can Planning confirm that he is correct that this is phase 1 of the development, and what makes that so?

(8) What is the impact of the lawsuit that was just filed on the action being asked of the Council? (GCW)

(9) What was Joe's authority for casting the City's votes in the condo association vote to approve the project? (GCW)

Mary P: Please search or ask Mary C. about this issue because I believe that she spotted it and we actually drafted an order that we sent to the Council for approval that authorized him to cast these votes. If not, she may remember what we did to decide that Joe could cast the votes and it may be reflected somewhere in the file.

II. Councilor Anton

(10) What is the City's obligation to enforce or comply with third party agreements between the developer and other organizations such as DEP and the Conservation Law Foundation? (GCW)

Answer: none.

(11) How have we defined for the purposes of this application the terms "residential hotel condominium"?

What is the difference between an apartment, a condo, a residential hotel condominium and a hotel under our current ordinance scheme? Are they rationally definitionally different?

(12) What is the Council's legal ability to impose legal restrictions on someone's right to rent their property? (GCW)

(13) What is staff's response to the allegations by opponents to the project that people already are not living up to or being held accountable for living up to existing conditions and restrictions that have been in place for years?

(14) What are those issues that staff concludes are more properly focused on as part of a site plan application before the planning board?

NB: I believe Rick Knowland's memo already answers this question specifically.

III Councilor Leeman

(15) What is the specific role being asked of the Council in this case? (GCW)

(16) In relation to this application, does this application still have sufficient right title and interest for this matter to be before the Council?

NB: The backup documents do not contain what I believe is the latest extension of our agreement with the developers under the purchase and sale agreement. That document needs to be found, copied and attached to our responses to these inquiries. Mary P: talk with Mary C. as I believe we approved this extension within the last month.

(17) There are density restrictions or requirements in both the 1989 agreement and the 1991 amendments. Which of these two legal documents controls the current density requirement and how is that requirement met by the current hotelminium proposal? (Planning)

IV Councilor Skolnik

(18) What is the legal basis for the Council's ability to impose transportation restrictions or limitations in this case? (GCW)

V Councilor Donoghue

(19) Why is this matter before the Council as a contract zone? (Planning)

(20) Is condominium a defined term in the city ordinance, and if so what is the definition? The same question for hotels and inns. (Planning)

(21) Are condos, hotels and inns allowed in other R zones? (Planning)

(22) Can we prohibit types of vehicles on public roads, and in what circumstances? (GCW)

Please get your responses to Mary P. so that she can compile them into one document in time to go out with the Council agenda for the October 6th meeting, i.e. we need all of these answers finalized and together by October 1st. Thank you.

Council Deliberations 9/3/08

I.M. D 2nd amendment: would these votes have passed w/o city participation?

w/ city over 67% only 63% if exclude city
Some figures, needs to be 2/3 majority.

Nick

might want to postpone final action, legal issues,
Some questions - 1) Treatment plant. verify what treatment plant
can accommodate, originally designed to accommodate

2) Traffic issue - Language inserted, language proposed

3) Trash impact? 4) Fire & Safety. (sprinkler) add 'i Fire pit ch

5) Is this spot zoning (Gaywood) 6) Rentals - Current rental program
activity and projected future 7) Beach front bar? is that proposed?

8) Open space in perpetuity issue - 9) Conservation easement for other property?

10) Law suit - affect on proceedings?

Anton

Agrees w/ Nick. Questions - groups of issues - apply for city staff to analyze
issues - especially where city is party to agreement; City
issue - what authority did city manager to exercise votes

1) Procedural; a) RTI b) Authority to vote city shares

2) Threshold issue of use - Is proposal compatible w/ comp plan
and is it spot zoning - define Res/Hotel / Condominiums
New development concept, Create a defined term in land use code
in general. Continuum apt, condo, res hotel condo, hotel

What is our practice, legal ability to regulate ownership vs Rental
when does rental term become commercial / hospitality use

3) Living by existing agreements - to which city is a party
what is staff opinion about living up to city/developer agreements

4) Public Services, solid waste, fire protection current practice
and direction headed

5) Sanitary waste, transportation (Site Plan Issues)
will be addressed by P Bd in Site Plan Subdivision
not precedent to Council action



6) Agreements - Open space restriction - Conservation
easement + proposal

Cheryl

- 1) What is role of City Council versus site plan review process. Council role relative to zoning
2. Specify matters pertinent to site plan review process e.g. transportation
3. legal memo from Guy Lawsvit, covenants clarify between 1989 versus 1991 agreements especially pertaining to density (DEP Limit of 100 versus 173 maximum)
4. How DIA ^{Transportation} proposed amendment differs from Planning Board proposed language. Seems quite similar. Same debate from 20 years ago, public versus private side of island. Diamond Cove has been a good neighbor to cottage side, should be one community.

Dan Kolnik

- Transportation Issue paragraph 5
- From legal standpoint - what is legal issue of continuous
- Outright prohibition of hotel transferring owners guests employees? - Tighten up par 5 to commit to restrict to what it purports to commit to.
- Owner manager restricted but others acting for owner manager
- Why reference compliance "to all existing ordinances"
- Stronger language than "directed to utilize"
- "advised not to utilize"

Jill

Covenants - Public documents - set up a difficult process for amending. Only reason we are here, City "accidentally" acquired 23 units. Developer should have stuck to it to generate a disposition. City role short-circuited process in favor of developer. Parties should go back to get 67% of interests (excluding city) to agree to a plan.

Kevin

Similar to Antea - Comp plan for Islands,
historic preservation, why cond-zone? Should hotels be
Is condo permitted in res zones? allowed anywhere
are Inn's permitted in res zones? in the
Vehicles restrictions on public roads? zone?
↳ Vehicle restrictions on vehicle types
Tax Credits - does that impact the project
e.g. forcing a commercial use versus residential
Police/Fine impacts, presence on island.

Dave Motion to postpone to next Council mtg
Sept 15!

Joe Suggests October 6 Dave moves postpone to
October 6.
7-1 Dusan opposed Cohen abstained,

G.D.I. Public Comment.

1. Bob Whelan, Pres DCHA. 1) DA 2) Vots 3) Project
Voting 2/3 145 total 134 93% proachieved last
100 in favor incl 23 by City 34 op
100 yes 45 no 34 no 11 no shows.
If loss out city 77 in favor 34 against 69% supermajority
2. Tom Moss - 6 yrs near D.Cove, dilapidated rodent infested
bldgs Active rental program for vacation rentals.
Renters are normal people.
3. Karen Tibbets full time Cove resident since 1998
Large hotel in middle of small residential neighborhood (Parade Ground)
Not in keeping w/intent of original plan to keep commercial uses
down in the Cove/Pier area. current design is different
from the design voted upon. No lock out rooms, 3 beds per
unit max 6 capacity.
4. Phil Conkling, Pres Island Institute - Argued in 1985
argued against the project 6 yrs later II. was signatory
to a development agreement. Argument 22 years ago is same as
today. Cannot use expensive urban infrastructure to build way out of
environmental requirements. City now owns 2 bldgs due to tax
foreclosure, Now developer proposes more intensive development
as way out.
5. Hilary Burrett - Rep. GAR, urges support of
going amendment to facilitate rehabilitation of
Double Barracks, historic tax credits will ensure
6. Mary Scirillo, works w/ Friends of Casco Bay. CSD commitment of bays
Concerned that redevelopment will impact water quality of Casco
Bay. concerned that developer to utilize existing treatment and
discharge system. OBD now banned, from 20 years ago
7. Robert Laughlin Pres. CBIDA signatory of development
agreement. CBIDA does not oppose redevelopment of buildings.
concerned about OBD, outdated now illegal
use of common land is also not allowed as part
of agreement. Language allows erosion of legal restrictions
Transportation concerns, Original agreements must be honored.
Preservation of clean water, open land, historic fort, cottage community

GD I ² Developer's Presentation.

8. David Bateman - original developer of Diamond Cove since 1984. Now represents [1aa@DiamondCove LLC](mailto:1aa@DiamondCoveLLC), partners in Portl/Harbor Hotel in city; First was not interested. But both buildings are part of historic structures that were pledged to be rehabilitated, Need persistence. Agreed to become involved, if DCHA is in support of project.
- Wastewater treatment - Application ready to file w/ DEP, Engineers say that plant has capacity to treat wastewater. Technical issue of capacity will be determined by DEP.
- Transportation - Front door is Diamond Cove Pier. Baggage coordination w/ CBH. Never attend position. Comments about success of Diamond Cove. Project is a success, otherwise would be a pile of rubble. Brought back an intricately developed project.
9. David ~~Ward~~ Lloyd - Bldg is in serious disrepair. Interior framing & porches have collapsed, Bldg + Porches will be restored historically. Bow area for pool + cabana. Low profile additions, 80% construction drawings fully sprinkled, IBC codes, etc.
10. Roch Ward - Basic grounding - since 1984 purchasing phase 1, 2. Neither phase completely built out. 77 of 134 built in phase 1. May 4 2007 signed P+S after RFP failed to generate any other proposal. Hearing tonight to amend cond rezoning agreement. Project is condominiums w/ a mesh use lock out + centralized management. Tonight is zoning only. Much opposition is about site plan, environmental concerns. Never a material environmental sacrifice due to failure of env infrastructure. Simple matter. Wastewater permit is central environmental issue - if no permit, no project.
- Transportation - Pre-ticket, no owners will be allowed, not for vehicles not even golf carts. Project is as originally anticipated - voted for by

- 11 Nancy Wilson 81 Sunset Ave. Secy of DIA, Complan is to preserve island. intent is not always achieved, solid waste in trucks in DIA property 2 Fire Safety - 2 persons, now volunteers, most construction sites a d renters 3. Transportation - 2004 zoning limited transportation. airport style shuttles were not the intent. DIA hired atty to shepherd language. Request Council to adhere to Complan + proposed language.
- 12 Bill Robichet - Previous president of DIA. Long memo of personal thoughts not representing DIA, Suva, Friend of Casca Bay. On behalf of Friends' group - representing union of both sides of island. against spot zoning to accommodate use proposal for 2 bldgs, to create 2 spot zones. No DEP permit application, No financial capability, Questionable legal right to apply as per lawsuit, Not meeting development agreements, not paid taxes. Offered to pay \$45,000 in back taxes. C. has per renewed agreement of developer.
- 13 Janet Gray - Marie Audobon, opposed to project. opposed to development components on dedicated open space. 1989 agreement called for open space preservation. water quality, density, wastewater discharge increase of 70 hotel units will increase pop.
- 14 Carlisle Turkey on behalf of Jim Reedy in support of project, member of DIA. Jim is in favor, department to save historic/dilapidated structures, traffic, wastewater, should be addressed in site review process.
- 15 Paul Gleason Sunset Ave, Hotel claimed as part of development plan, was never part of development plan. Reads from Complan. overall goal balance future growth preserve natural social fabric. Only 12-14 islands have VCR pop like in Marie, Suva, Hula.
- 16 Richard McGoldrick - owns home in GDI, pays over \$500,000 in ptxs. Majority support the project. Assoc. does keep going. development will reduce fees by 20%. C. has trash, uses beach land. Friends of GDI please stand.
- 17 Faith Goodreau 17 McKinley Court, moved after losing husband from cancer. opposed to project limit of 100 units, commercial units in core only. Benefits as residential units. Hotel ought not be located on Parakeground - traffic for guests staff + users. Will introduce thousands 100 strangers adjacent to playground (Parakeground?) Opposed to amendment to allow hotel.
- 18 Brad Forsyth - 4 yrs resident GDI. Questions - Islands unique zoning amended twice. Next will be beach front bar. Whose applicant? Who determined structure is close to collapse what is an issue? What if wastewater fails? 18,000 people per year @ 100% occupancy.

Forsyth cont'd.

18. Dollar bid - will add 25,000 to alternate. 50,000 bid. Hotel w/ weddings, what if Hell's Angels?
19. Tim Norton Rep. Fed GDLCC filed lawsuit challenges title to votes used to amend covenants. If successful, covenants not amended. Developer has no right title and indeed. Agreement w/ city expired Aug 08 unless extended. Multiple of agreements. City restrictions - open space kept in perpetuity - Council has right to amend, but against that provision. DEP orders structural provisions. private agreements, parties to these agreements opposed to project Association covenants. If city had not voted, amendments could not have ^{passed}
20. Jean Boulos Smith. DIA Bd Dir, Liaison w/ city. Public site, fuel business conservation land, monthly meetings work w/ Mike Murray, mosquito control DIA not opposed to project so long as arrivals + departures from development from Cove only. No large wheel airport style vehicles. Invert language proposed by atty Katsirficas.
21. Jim Katsirficas. Rep DIA, proposed change to rules.
22. Ken Wood - Elliott MC. DCove since 1994, friend + neighbor of Dave Bateman. Originally was going to be a corporate retreat, hospital as artist's residence. change is manageable. more clients + visitors to support restaurant, golf store, etc. Reduction of covenants
23. Tom Lucke GDL 12 years, former pres DIA, Dinner than snake mitters. 1) ^{not} consistent w/ comprehensive plan + land use code, 60 rm hotel w/ transient traffic, double traffic. Nothing in record addresses this; Emotional comment: 60 families on village green
24. Peter Johnson Boost volume
25. Ann Riley Ba Dimon. Cove, ^{YR Rd.} 300' from Inn, See the Barracks e.e.c. today can't wait for rehab of barracks.
26. Edith Yarland since 1930's; Questions to ask. 1) If successful, why so many 40 units up for sale?
27. Barbara Armandis - 17 yr res. Past President ~~GDL~~ DIA, Prior lawsuit, court order - enforcement issues. → golf cart w/ agreements not enforced. development of open space. guests will have prepaid tickets, what about construction workers, employees, wait staff, owners will have access to shuttle, "Best efforts" means nothing. consider DIA language on transportation. Volunteer fire dept. can't go into bldg. Renters could skirt fines.
28. Oliiver Kiethly 13F facing development; strongly supportive. Now an eyesore + hazard. Keep general store going
29. Jane Laughlin, Bd of CBIDA, Land trusts. wastewater, transport. Use of land intended to be open space - as condition of granting permission to develop - Require a permanent conservation easement to be held by any appropriate Land Trust

30. Sus Baker-Korten - concerned about proposal. Cottage community is very stable, Island family. Diamond Cove more of a resort investor community rather than island residential community.
13% in favor 17% no opinion 69% against of registered voters
31. Barbara Young - 12 yrs - Diamond Cove, Application not properly before the City
13.1 covenants and restrictions run w/ land. 20 years to alter, requires 80% vote to change - New structure which is not part of lot. only an easement, 10.3 easement language.
Materials do not include site order from DEP, w/ 100 unit maximum.
On substance, does it make sense from zoning issue, pictures of site.
Mixed use zone / Parade ground area, Commercial uses proposed in residential area. B+B was to be @ Pier;
32. Laurie Lucke - vote against proposed zone changes. majority is opposed to this project. What the residents want; Full-time - Seasonal - Investors - Full-time res oppose 2 to 1, 30 to 12,
33. Tony Calcagny - DCHA, Not an applicant, represents DCHA 2nd amendment was duly voted upon. Recreation/open space
2 Audobon agreements '84 Phase 1; '91 Phase 2; Phase 2 preservation Declarator + Covenants; Restriction applies to phase 2 only... Open space in phase 1 allows lease/easements.
13.1 section - Duration of covenants; Amendments Section 12
67% voting interest - Addition in courtyard - Bldg 46, courtyard common to bldg. 10.2, limited to use by bldg only.
34. David Kaplan - Which order authorized Joe Long to vote has 23 votes
35. Sandy Fitch - opposed to project. Statement by Ely Wanzon (cottage side).
Developers propose to use old military cemetery for septic systems, is a sacred place

Agreement or to rezone the PROPERTY."

I am currently representing, and have represented in the past, individuals whom the City has charged with relatively modest violations of the Land Use Ordinance (particularly the Shoreland Zoning regulations). The City has proceeded with zeal in those enforcement actions, consistently rejecting property owners' attempts to justify the violations. It is impossible to reconcile the City's aggressive prosecution of lesser land use violations with its unwillingness to penalize DCHA for violating a core provision of the 1985 CZA by sending, each day, shuttle busses, vans, and trucks to meet every ferry that docks at the State Pier. DCHA's flaunting of Condition 8, every day, 365 days per year, shows contempt not only for my clients and their neighbors, but for the City itself. Contempt aside, those violations also are rapidly destroying the unique character of Great Diamond Island that the 1985 CZA was designed so carefully to preserve.

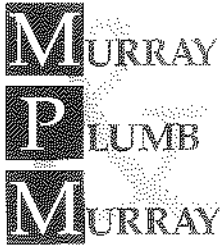
Thank you for your consideration of this e-mail. I look forward to hearing from you.

John

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IRS Notice: In accordance with I.R.S. Circular 230 we advise you that any tax advice in this email (or in any attachment) is not intended or written to be used, and cannot be used, by any recipient for the avoidance of penalties under federal tax laws. Thank you.

CC: Knowland, Rick



Attorneys At Law

Peter S. Plumb
John C. Lightbody
Thomas C. Newman
John C. Bannon
Drew A. Anderson
Richard L. O'Meara
Christopher B. Branson
Michael D. Traister
Barbara L. Goodwin
Timothy H. Boulette
John B. Shumadine
Sarah A. McDaniel
Thomas L. Douglas
Kelly W. McDonald
Nicole L. Bradick

Of Counsel:
Peter L. Murray
Barbara T. Schneider

E. Stephen Murray
(1941-2001)

75 Pearl Street
Post Office Box 9785
Portland, Maine
04104-5085

Telephone:
207.773.5651

Facsimile:
207.773.8023

E-Mail:
info@mplaw.com

WWW:
mplaw.com

June 19, 2008

The Portland Planning Board
City of Portland
389 Congress Street
Portland, Maine 04101

RE: *Application by the Inn at Diamond Cove, LLC for Second Amendment to Conditional Rezoning Agreement for Fort McKinley*

Dear Chair Tevanian and Board Members:

This office represents Anthony and Judy Savastano, who own property abutting Nancy Lane and the State Pier parcel on Great Diamond Island. As a general matter, the Savastanos do not oppose the historic preservation of the Double Barracks and the Hospital for a more productive use such as the proposed Inn at Diamond Cove (hereafter the "Inn"). However, the Savastanos are vitally concerned with preventing any increase in the adverse traffic impacts from the Fort McKinley development.

For that reason, the Savastanos request that if the Planning Board recommends approval of the proposed rezoning for the Inn, such approval be conditioned on a strict prohibition against the occupants¹ of the Inn using motor vehicles – including vehicles for the "common transportation of goods and passengers" -- outside the Fort McKinley development.

To request such a condition should be unnecessary, because the developer has effectively assented to such a prohibition already. In a memorandum to the Planning Department dated April 29, 2008, the Inn at Diamond Cove LLC made the following representation:

Following construction, all of our owners, guests and employees will be...specifically advised not to utilize any off-site facilities, including the public pier at the south end of the Island. Over time it is possible that the Project and DCHA will collaborate on certain transportation *but*

¹ In this letter, I use the term "occupants" as a short-hand expression for Diamond Cove Associates, the Inn at Diamond Cove LLC, their employees, individual owners of the hotelminium units, anyone occupying the hotel units by permission or lease from the owners of those units, guests and invitees of the foregoing persons, and anyone succeeding to the interests of those persons.

the Project will not be collaborating on any transportation which exits the Ft. McKinley site.

(emphasis added). However, in Paragraph 5 of its most recent draft of “Supplemental Conditions and Restrictions” for the Inn rezoning, the developer suggests the following language to govern vehicular transportation to and from the Inn:

The Owner/Manager shall not provide motorized ground transportation off the Fort McKinley Project site and all such transportation shall strictly conform to all *existing* ordinances, rules, and regulations² concerning travel outside of the Project site to the public pier at the southerly end of Great Diamond Island.

Because that proposed language could be interpreted as a retreat from the developer’s April 29th memorandum, the Savastanos respectfully request that the Planning Board reject that language and instead adopt wording that unambiguously precludes the Inn’s occupants from using vehicles of any kind outside the Fort McKinley Project site, even if those vehicles are “provided” by the DCHA or other sources besides the Owner/Manager.³

The Savastanos request such language, not only to protect their peaceful enjoyment of their home on Nancy Lane, but to protect the structural integrity of Nancy Lane itself. During the proceedings that led to the 2004 Amendment, the DCHA indicated that the type of “common transportation vehicles” it might use were on the order of large SUV’s capable of carrying a small number of passengers at a time. After the 2004 Amendment, DCHA purchased

² Although a relatively minor point, the expression “ordinances, rules, and regulations” is inappropriate because it does not include other sources of the vehicle restrictions such as regulatory approvals and related agreements.

³ It is my understanding that the Diamond Island Association, ably represented by Attorney Jim Katsiaticas, will be offering alternative wording that would accomplish that result. The Savastanos prefer the DIA’s proposed language, but would recommend the Planning Staff’s suggested wording as a superior alternative to that contained in the developer’s draft conditions. The most recent Planning Staff proposal with which I am familiar adds the following language to Condition 9 of the 1985 Rezoning Agreement, as modified by the 2004 Amendment: “Moreover, and by way of further restriction, no owner or occupant of the Double Barracks or Hospital building shall be permitted to utilize water transportation from the southern side of the Island unless such occupant(s) walks to or from the southern pier.”

first one and then a second 20-seat bus of the size commonly used as airport shuttles. Those busses begin arriving at the State Pier at 5:30 a.m. and continue throughout the day until the last ferry leaves. They do so regardless of whether the ferry is also providing service to the Diamond Cove Pier on that day. Usually those buses are accompanied by one or more pick-up trucks or panel vans used to haul luggage and supplies brought by Diamond Cove residents.

Overuse of Nancy Lane by the DCHA busses and accompanying trucks has already left that dirt road pitted with large potholes and deep ruts, such that the narrow isthmus connecting the State Pier with the Island proper is suffering from severe erosion. That damage increases the risk of accidents on Nancy Lane, impedes passage by emergency vehicles, and substantially undermines the structural integrity of the road. It has become difficult for some pedestrians to walk on the road. It is my understanding that the Public Works Department is currently seeking a remedy for repairing that damage, but has yet to arrive at a workable solution.

It should not have come to this. When the City approved use of the Island roads by “common transportation” vehicles from the Cove, it did not intend that the use of such vehicles would increase to the point where it would cause traffic congestion and excessive road wear, and would undermine the City’s design that the Fort McKinley developments respect the pedestrian-oriented character of the Island.

It must not be forgotten that Section 145 of the Land Use Code establishes the following criteria for rezoning to IR-3 and for any development within the IR-3 Zone:

- “IR-3 zones should not be established unless issues of municipal services, including infrastructure...and police and fire services and other municipal services can be appropriately and adequately addressed.” Section 14-145(13)(c).
- “The project shall be designed primarily with a pedestrian orientation to minimize the use of and dependency on private motor vehicles.” Section 14-145.16(a).

The same emphasis on preventing significant vehicular traffic is found in the 1985 Conditional Rezoning Agreement, several regulatory approvals and

June 19, 2008

Page 4

permits issued for the Fort McKinley project, and the settlement agreement between Diamond Cove Associates, Maine Audubon Society, the Conservation Law Foundation, and the Island Institute dated March 2, 1989.

The August, 2004 Conditional Rezoning Amendment was conditioned on DCHA submitting to the Planning Authority, within 60 days, a transportation plan for managing, among other things, the Association's use of "common transportation" vehicles on roads passing through the southerly part of the Island. DCHA did not submit even a draft transportation plan for several months, and four years later, the Planning Authority has yet to approve the transportation plan. If, as is required under Section 14-145(13)(c), IR-3 zones should not be established unless "issues of municipal services, including infrastructure... and police and fire services and other municipal services can be appropriately and adequately addressed," the Planning Board should not recommend yet another amendment to the 1985 Conditional Rezoning Agreement before the conditions of the 2004 Amendment have been satisfied.

Just as importantly, the City has yet to develop any effective means of *enforcing* the traffic restrictions contained in either the 1985 Condition Rezoning Agreement or the 2004 Amendment. The prohibition against the use of individually-owned vehicles to travel from the Fort McKinley property loses most of its force if persons residing within that property are allowed to access the State Pier by unlimited use of large "common transportation vehicles" that are substantially heavier, more obstructive, and more damaging of the road than the golf carts they were meant to replace. The City's prolonged failure to enforce the vehicle restrictions has only accelerated the growth of motorized traffic on Nancy Lane.

As of today, the allowance for common transportation vehicles in Condition 9 of the 1985 Conditional Rezoning Agreement and the 2004 Amendment is a failed experiment. The allowance for common transportation vehicles, which in theory could have preserved the pedestrian character of the southerly side of the Island, has been abused to the point where that character has been lost and the Island's road infrastructure compromised.

The Planning Board and the City Council must rethink the issue of motor vehicle transportation on the Island in general. Logically, the Planning Board should conduct that general re-evaluation before making any recommendation on whether the City Council should adopt the Inn-related rezoning. If the Planning Board nevertheless wishes to complete its review of

June 19, 2008

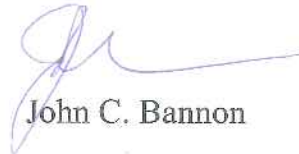
Page 5

the rezoning request at this time, it cannot responsibly do so without first ensuring that the proposed Inn project will not make the existing problems worse. The only way of preventing additional damage to the road surface and further interference with the pedestrian-oriented character of the Island is by preventing the occupants of the Inn from travelling over Nancy Lane in *any* motor vehicle, whether it is provided by the developer, the DCHA, or anyone else.

The developer has already represented that the Inn project does not need to make use of motor vehicles outside the Fort McKinley project or to “collaborate” with the DCHA on “any transportation which exits the Ft. McKinley site.” The Planning Board must require the developer to honor that representation by imposing a condition that, if occupants of the Inn project wish to access the State Pier, they shall do so on foot only.

Thank you for your consideration of this letter.

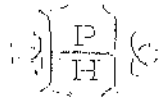
Sincerely,



John C. Bannon

JCB/dmw

cc: Anthony and Judy Savastano
Richard Knowland, Senior Planner
James N. Katsiaficas, Esq.
Ronald N. Ward, Esq.



1-5

PORTLAND HARBOR HOTEL

Old Port District

April 29, 2008

Inn at Diamond Cove, LLC
PO Box 3572
Portland, ME 04104

Re: Mainland Parking Facilities for
the Proposed Inn at Diamond Cove

Gentlemen:

The Portland Harbor Hotel, acting as the Manager for the proposed Inn at Diamond Cove, will provide mainland parking for the island guests. The Portland Harbor Hotel currently has adequate excess parking available through both its on and off site parking leases.

Sincerely,

Gerard Kiladjian
General Manager

COPY

PERKINS THOMPSON
ATTORNEYS & COUNSELORS AT LAW

ESTABLISHED 1871

ONE CANAL PLAZA
PO BOX 426
PORTLAND, ME 04112
TEL 207.774.2635
FAX 207.871.8026

www.perkinsthompson.com

June 15, 2009

Ms. Marybeth Richardson
Maine Department of Environmental Protection
312 Canco Road
Portland, ME 04103

Re: The Inn at Diamond Cove, Great Diamond Island, Portland, Maine
Application for Amendment to Site Location of Development Permit
L-013160-87/03-A-N

Dear Marybeth:

As you know, this Firm represents the Diamond Island Association (DIA), an association of property owners on the south side of Great Diamond Island.

I understand that you recently inspected the solid waste storage area on Great Diamond Island operated by the City of Portland under a license from DIA. This is the area that DeLuca-Hoffman Associates, Inc. initially had indicated to you would be used by the applicant Inn at Diamond Cove LLC for solid waste generated by its proposed new "hotelminium" development. In particular, Section 18 of the application for amendment to the 1986 Site Location Order referenced above had stated:

Operational Waste Generated

Once the Inn at Diamond Cove is constructed and placed into service, all operational solid waste will be collected at a central location within the Inn. All collected waste is hauled to a central repository on the island by the Diamond Cove Homeowners Association. The City of Portland collects the refuse from the central repository and hauls it off site for disposal at Eco-Maine.

We understand that as a result of your inspection, the applicant has been informed that it will not be permitted to use the City-operated facility for solid waste collection and storage prior to transportation and disposal.

We now are in receipt of a copy of a June 9, 2009 letter from DeLuca-Hoffman Associates, Inc to you proposing to revise the application to state that no operational solid waste from the proposed Inn at Diamond Cove will be transferred to the City's central repository on the Island, and that "Operational solid waste from the proposed

DOUGLAS S. GARR

PHILIP C. HUNT

JOHN S. UPTON

PEGGY L. MCGHEE

MELISSA HANLEY MURPHY

JOHN A. CIRALDO

JOHN A. HOBSON

JAMES N. KATSIARCAS

TIMOTHY P. BENOT

J. GORDON SCANNELL, JR.

FRED W. BORP III

MARK R. SNOW

WILLIAM J. SHEETS

DAVID B. MCCONNELL

PAUL D. PETROPAOLI

HOPE CREAL JACOBSEN

RANDY J. CRESWELL

JENNIFER H. PINCUS

DAWIN K. HARMON

CHRISTOPHER M. DARGO

ANTHONY J. MANHART

STEPHANIE A. WILLIAMS

PETER J. McDONELL

LAUREN H. EPSTEIN

KEITH J. DUNLAP

SARA N. MORPHE

OF COUNSEL

THOMAS SCHULTEN

OWEN W. WELLS

ANDREW A. CADOT

JULIANNE C. RAY

Inn at Diamond Cove will be collected and store within the Inn facility and transported to the island barge landing site for immediate loading and hauling by the City to disposal at EcoMaine.”

This latest letter from DeLuca-Hoffman raises several concerns for DIA.

First, the June 9, 2009 DeLuca-Hoffman letter uses the term “operational solid waste.” Does this mean that the proposed Inn at Diamond Cove intends to place non-operational solid waste in the City’s “central repository” pending transportation off of the Island? Also, since the term “operational solid waste” is not a defined term under the Maine Solid Waste Management Act or local ordinance, what is meant by this? What would be non-operational solid waste – construction and demolition debris?

Second, paragraph 2. of the June 9, 2009 DeLuca-Hoffman letter speaks of collection and storage of operational solid waste “within the Inn facility.” This is consistent with the City’s recent (2008) amendment to the 1985 conditional rezoning amendment, enacted specifically for the proposed Inn at Diamond Cove, provides:

6. Disposal of solid waste. All solid waste generated on the Premises shall be collected and disposed of privately, on the mainland, **with temporary storage of such waste being handled within the building** and disposed of in accordance with all applicable regulations, codes and laws; or if, in the City’s opinion, it would not create an unreasonable burden thereon, at a municipally-operated island solid waste disposal facility. (emphasis added)

We support this revision to the permit application, since what the applicant is proposing is consistent with the City rezoning ordinance and with the concept that runs through the State and local permits and approvals for the existing Diamond Cove development -- that the Diamond Cove development be separate from the cottage community on the south side of the Island, and that the Diamond Cove development address on its own property the impacts of its development.

This leads us to the third and final point of this letter – the reference to the “island barge landing site” in paragraph 2. of the June 9, 2009 DeLuca-Hoffman letter. When it states that the solid waste will be “transported to the island barge landing site for immediate loading and hauling by the City for disposal at EcoMaine,” does this mean the Island barge landing site abutting the Fitch property? This of particular concern because of the current litigation over the ability of Diamond Cove Homeowners Association and the City to use the current Island barge landing that abuts the Fitch property. Allowing relocation of the Island barge landing site for the Inn at Diamond Cove’s use for its solid waste transportation needs to an area outside of the Diamond Cove property site would be inconsistent with the concept that Diamond Cove be kept separate from the South part of the Island and that it take care of its transportation and solid waste needs on Diamond Cove property – not at the south State pier or some other location outside of Diamond Cove. It also would be inconsistent with the Site Location Order for Phase I

(paragraph 6) that this applicant seeks to amend, which now requires Diamond Cove-generated solid waste to be collected and transported from the Diamond Cove pier by DCHA:

6. Construction Debris and Residential Solid Waste

Residential waste generated by the project will be collected by a private contractor and transported **from the rehabilitated Diamond Cove pier** to Scarborough for disposal at the Regional Waste Services, Inc. balefill. The RWS balefill is being operated in compliance with an Administrative Consent Agreement and Enforcement Order dated September, 1985. (emphasis added)

DCHA represents the existing Diamond Cove site and has given the applicant permission to build the Inn at Diamond Cove on DCHA property. Therefore, an amendment to the existing Diamond Cove development's Site Location Order solid waste provision should require the proposed Inn to abide by the same restrictions that apply to the existing Diamond Cove development and to DCHA – that waste generated in Diamond Cove be transported from Diamond Cove. Thus, DIA strongly urges, if DEP approves the application, that the DEP Order state as follows regarding Solid Waste:

Solid waste from the Inn at Diamond Cove will be collected and stored within the Inn at Diamond Cove facility and transported off of the Island for disposal from the Diamond Cove property.

Thank you for your consideration of this matter.

Sincerely,



James N. Katsiaficas

JNK:pal

cc: Gary C. Wood, Corporation Counsel, City of Portland
Michael J. Bobinski, Director of Public Services, City of Portland
Richard Knowland, Senior Planner, City of Portland
Peggy Bensinger, Assistant Attorney General
Ronald Ward, Esq., Drummond Woodsum
Judy Sedgewick, President, Diamond Island Association
Michael Harris, Chair, Island Development Committee, DIA



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www.portlandmaine.gov

Corporation Counsel
Gary C. Wood

Associate Counsel
Mary E. Costigan
Danielle P. West-Chuhra
Ann M. Freeman

June 9, 2009

Marybeth Richardson
Maine Department of Environmental Protection
312 Canco Road
Augusta, ME 04103

Re: The Inn at Diamond Cove

Dear Marybeth:

I am writing in response to a letter addressed to you dated April 16, 2009 from the Diamond Island Association (DIA). In their letter, DIA objected to a statement in the Inn at Diamond Cove's application for an amendment to the 1986 Site location Order for Diamond Cove. That statement, regarding operational waste generated at the Inn, says that all operational solid waste will be collected at a central location within the Inn, hauled to a central repository in Diamond Cove, collected by the City and hauled off the island by the City. The City joins DIA in objecting to this statement.

On October 6, 2008, the Portland City Council approved supplemental conditions and restrictions for buildings 46 ("Double Barracks") and 19 ("Hospital") within the Ft. McKinley property. Said buildings are the locations of the proposed Inn at Diamond Cove. With regard to the disposal of solid waste generated by the Inn, the amendment states that all solid waste "shall be collected and disposed of privately, on the mainland, with temporary storage of such waste being handled within the building and disposed of in accordance with all applicable regulations, codes and laws; or, if in the City's opinion, it would not create an unreasonable burden thereon, at a municipally-operated island solid waste disposal facility." At this time, it is the City's position that all waste from the Inn will be disposed of privately. There is currently no intention by the City to permit disposal at a municipally-operated facility; nor does the City intend to haul trash off of the island that is generated by the Inn and hauled to a central repository in Diamond Cove. The City therefore objects to the section of the Inn's Site Location Order amendment application regarding the operation waste generated and requests that the DEP require the Inn to handle trash in accordance with the supplemental conditions and restrictions approved by the City.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Sincerely,



Mary E. Costigan
Associate Corporation Counsel

cc: Michael Bobinsky
Mike Murray
Jim Katsiaficas
Rick Knowland ✓
Ron Ward



DeLUCA-HOFFMAN ASSOCIATES, INC.
CONSULTING ENGINEERS

774 MAIN STREET
SUITE B
SOUTH PORTLAND, MAINE 04306
TEL. 207 775 1121
FAX 207 879 0890

■ SITE PLANNING AND DESIGN
■ ROADWAY DESIGN
■ ENVIRONMENTAL ENGINEERING
■ PERMITTING
■ AIRPORT ENGINEERING
■ CONSTRUCTION ADMINISTRATION

June 9, 2009

Ms. Marybeth Richardson
Maine Department of Environmental Protection
312 Canco Road
Portland, Maine 04103

**Subject: The Inn at Diamond Cove – Great Diamond Island, Portland, Maine
Site Location of Development Permit Amendment
DEP Site Location Permit #L-013160-87/03-A-N
Response to Solid Waste Comments**

Dear Marybeth:

As discussed at the end of last week, it is our understanding that the existing City-operated solid waste central repository facility on Diamond Island will not be an acceptable location for temporarily storing operational solid waste from the Inn at Diamond Cove until it is transported to barge for offsite disposal.

With respect to this solid waste issue on the island and the Inn at Diamond Cove application, the applicant is proposing to revise the permit application as follows:


1. No operational solid waste from the Inn at Diamond Cove will be transferred to the City's central repository on the island.
2. Operational solid waste from the Inn at Diamond Cove will be collected and stored within the Inn facility and transported to the island barge landing site for immediate loading and hauling by the City to disposal at EcoMaine.

A copy of the revised Section 18 of the permit application that reflects these revisions is appended to this letter.

Please contact our office with any questions you have concerning this project.

Sincerely,

DeLUCA-HOFFMAN ASSOCIATES, INC.


Joseph A. Laverriere, P.E.
Senior Engineer

JAL/sq/JN2769/Richardson-6-9-09

Enclosure

c: David Bateman – The Inn at Diamond Cove LLC
Richard Knowland – Senior Planner, City of Portland

SECTION 18

SOLID WASTE

18.0 Overview

The solid waste associated with the renovation and construction of the Inn has been summarized in this section. This section discusses the anticipated solid waste generation and identifies the responsibility for collection, transport, and disposition of this waste.

18.1 Special or Hazardous Wastes on the Site

There are no known special or hazardous wastes associated with the site.

18.2 Construction Debris

The Inn at Diamond Cove will be built to achieve a LEED rating by the USGBC. As part of this rating, the applicant will retain a General Contractor that will be required to supply several roll off dumpsters to handle different types of waste materials for recycling and disposal. The General Contractor for the project will be required to enter into a contract with a licensed solid waste disposal firm for the hauling of all construction and demolition debris related to the project. Mixed construction material waste will be transported to a facility licensed by the MeDEP to accept mixed construction debris. Separate wood debris may be transported to the Biofuels limited facility in Lewiston, Maine. Separated metal/ferrous material shall be transported to Grimmel Industries in Topsham.

Land clearing will include cutting of trees and stump removal. The General Contractor will be required to have the trees chipped or removed for pulp and to grind stumps, brush and trees onsite and use the grindings or chipped material for erosion control mix. The volume of stumps, grubblings, and chipped vegetation that will be generated by the project has been estimated at 200 cubic yards (refer to Attachment A). The general contractor will be required to file appropriate forms with the Maine Forestry Department.

Approximately 145 cubic yards of construction debris (after recycling) will be generated from the construction of the proposed inn.

Concrete and bituminous concrete will either be processed onsite or hauled to an approved recycling facility such as Commercial Recycling in Scarborough, Maine.

18.3 Grit/Sediment Removal

The applicant will enter into a maintenance contract for grit/sediment removal. It is anticipated that catch basin grit/sediments will be removed from the structures and disposed of by the Contractor at a licensed facility.

18.4 Operational Waste Generated

Once the Inn at Diamond Cove is constructed and placed into service, all operational solid waste will be collected at a central location within the Inn. All collected waste **will be transported to the island barge landing site for immediate loading and hauling by the City to disposal at EcoMaine.** ~~is hauled to a central repository on the island by~~

~~the Diamond Cove Homeowner's Association. The City of Portland collects the refuse from the central repository and hauls it off-site for disposal at Eco-Maine.~~

18.5 Attachments

Attachment A – Computations estimating the volumes of solid waste to be generated and recycled by this project.

ATTACHMENT A

**Computations of Types of Volumes of
Solid Wastes for Project**

SOLID WASTE CALCULATIONS

1. Stumps/Grubbings

The site work will require some clearing of about 0.5 acres of forest.

Assume 400 cy per acre for forests.

$$0.5 \text{ acres of forest at } 400 \text{ cy/acre} = 200 \text{ cy}$$

2. Construction Debris Generated by the Proposed Project

A. Building Renovation

Assume 12 c.y./1,500 s.f. of finished space – $34,000 \times 12/1,500 = 272 \text{ c.y.}$

If 50% is recycled and transported to the facilities listed above, about 136 c.y. of mixed material would go to a licensed facility for disposal.

B. Building Expansion

Assume 10 c.y./1,500 s.f. of finished space – $2,740 \times 10/1,500 = 18 \text{ c.y.}$

If 50% is recycled and transported to the facilities listed above, about 9 c.y. of mixed material would go to a licensed facility for disposal.

3. Operational Waste

Based upon similar hotel facilities owned and operated by the applicant, a 100-room hotel with restaurant facility typically generates 3 tons (60 c.y.) of operational waste on a monthly basis. Therefore, on a per-room basis, the anticipated operational waste volume is 0.03 tons (0.6 c.y.) per month.

The proposed 20-unit inn is anticipated to generate 0.6 tons (12 c.y.) of operational waste on a monthly basis during the peak season (June through September).

April 16, 2009

Ms. Marybeth Richardson
Maine Department of Environmental Protection
312 Canco Road
Portland, ME 04103

Re: The Inn at Diamond Cove, Great Diamond Island, Portland, Maine
Application for Amendment to Site Location of Development Permit
L-013160-87/03-A-N

Dear Marybeth:

This Firm represents the Diamond Island Association (DIA), an association of property owners on the south side of Great Diamond Island. The cottage community on the south side of the Island that DIA represents has been in existence since the 1880s.

We have received a copy of a letter dated March 11, 2009 from Joseph A. Laverriere, P.E. of DeLuca-Hoffman Associates, Inc. to you transmitting an application for amendment to the 1986 Site Location Order referenced above. These materials show that the applicant for the Inn at Diamond Cove LLC is seeking to amend that 1986 Site Location Order with regard to solid waste (and other items) to provide that the solid waste generated by this new "hotelminium" development would be brought by the Diamond Cove Homeowners Association (DCHA) to a central repository on the Island for collection and disposal by the City of Portland (City). In particular, Section 18 of the application states:

Operational Waste Generated

Once the Inn at Diamond Cove is constructed and placed into service, all operational solid waste will be collected at a central location within the Inn. All collected waste is hauled to a central repository on the island by the Diamond Cove Homeowners Association. The City of Portland collects the refuse from the central repository and hauls it off site for disposal at Eco-Maine.

We assume that the "central repository" the applicant seeks to use is the parcel owned by DIA and used by the City of Portland under License with DIA to store residential solid waste generated by the cottage community on the south end of the Island until it can be removed by the City from the "barge landing."

DOUGLAS S. CARR
PHILIP C. HUNT
JOHN S. UPTON
PEGGY L. McGEHEE
MELISSA HANLEY PURPHY
JOHN A. CIRALDO
JOHN A. HOBSON
JAMES K. KAISHAKAS
TIMOTHY P. SENOU
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RANDY J. ORESWEI
JENNIFER H. FINCUS
DAWN M. HARRISON
CHRISTOPHER M. DARGIE
ANTHONY J. HANHART
STEPHAN E. WILLIAMS
PETER J. McDONNELL
LAWRENCE J. EPSTEIN
KEITH J. DUNLAP
CHARLES W. COLCOTT
SARA N. MOPPIN

OF COUNSEL
THOMAS SCHEIDTEN
OWEN W. WELLS
ANDREW A. CADOT
JULIE ANN C. JAY
CATHERINE O'CONNOR

First, the storage of solid waste generated by the proposed Inn at Diamond Cove at the central repository on DIA property: (1) runs counter to the applicant's prior public statements; (2) is inconsistent with prior DEP orders and City rezoning amendments, which sought to separate the south cottage side of the Island from the Diamond Cove development to prevent adverse impacts to the cottage community; (3) is contrary to the City's rezoning amendment for this proposed development; (4) is contrary to the City's policy on solid waste disposal generated by commercial development; (5) would represent the expenditure of public funds for a private purpose; and (6) was not contemplated when the City and DIA entered into the License for the storage of public works equipment/materials and solid waste on DIA property.

(1) DIA understood David Bateman, speaking for the applicant, to state in public proceedings before the Portland City Council and Planning Board that the Inn at Diamond Cove would be self-sufficient in all respects, and did not take from that statement that solid waste from the proposed Inn would be transported by DCHA to the temporary storage facility operated by the City of Portland on property licensed to the City by DIA for disposal by the City.

(2) The DEP and City permits and approvals for Phases I and II of the existing Diamond Cove development essentially separate the south side of the Island from the Diamond Cove development so as to avoid adverse impacts of the Diamond Cove development on the existing cottage community. The Site Location Order for Phase I (paragraph 6) requires Diamond Cove-generated solid waste to be collected and transported from the Diamond Cove pier by DCHA:

6. Construction Debris and Residential Solid Waste

Residential waste generated by the project will be collected by a private contractor and transported from the rehabilitated Diamond Cove pier to Scarborough for disposal at the Regional Waste Services, Inc. balefill. The RWS balefill is being operated in compliance with an Administrative Consent Agreement and Enforcement Order dated September, 1985.

Similarly, the Site Location Order for Phase II provides in paragraph 5:

Household waste generated by the residents of the proposed lots will be transported to South Portland for incineration at the Regional Waste Systems, Inc. ("RWS") solid waste facility. The RWS incinerator is currently being operated in substantial compliance with the Solid Waste Management Regulations.

Likewise, the City's 1985 conditional rezoning amendment regarding solid waste disposal by the Diamond Cove development states:

6. Disposal of solid waste. All solid waste generated on the Premises shall be collected and disposed of on the mainland or if, in the City's opinion, it would not create an unreasonable burden thereon, at a municipally-operated island solid waste disposal

facility, in a manner which meets all applicable federal, state and local requirements, and at the Owner's expense.

Apparently, at the time, it was thought that the City of Portland would establish a municipal solid waste disposal facility on Peaks Island, but this never came to fruition.

The City's recent (2008) amendment to the 1985 conditional rezoning amendment, enacted specifically for the proposed Inn at Diamond Cove, provides:

6. Disposal of solid waste. All solid waste generated on the Premises shall be collected and disposed of privately, on the mainland, with temporary storage of such waste being handled within the building and disposed of in accordance with all applicable regulations, codes and laws; or if, in the City's opinion, it would not create an unreasonable burden thereon, at a municipally-operated island solid waste disposal facility.

Thus, the DEP orders and City rezoning amendment sought to minimize the adverse impacts of solid waste generated by the Diamond Cove development on the existing cottage community by requiring the solid waste generated by Phases I and II of Diamond Cove to be removed by the developer and residents (now DCHA) from the Island to the mainland.¹

(3) As noted above, the City's 2008 amendment to the rezoning amendment that permits the proposed Inn at Diamond Cove as a land use specifically allows the temporary storage of solid waste within the building – not at a “central repository” as the applicant now proposes – prior to the private disposal of that waste on the mainland. (Copies of the City rezoning amendment for the original Diamond Cove development and for the proposed development are enclosed.)

(4) The City's Code of Ordinances requires the owners of commercial properties to make private arrangements for solid waste collection and disposal. Section 12-17(b) of the Code provides that “Solid waste and recyclable material shall not be collected by the city from any

¹Another illustration of that regulatory intent that the project would be separate from and not adversely impact the cottage community on the south end of the island is the regulation of traffic generated by the Diamond Cove project and of transportation between the Diamond Cove development and the mainland. Paragraph 11 (“Traffic”) of the DEP Site Location Order referenced above directed the reconstruction of the central pier in Diamond Cove and the use of Casco Bay Island Transit District ferries to schedule an additional stop at that Diamond Cove pier in order to provide access to and from the property without using the pier at the southerly end of the Island. Similarly, the underlying conditional rezoning amendment enacted by the City of Portland requires the developer to provide transportation between the mainland and the Island at Diamond Cove; prohibits Diamond Cove residents from operating and storing motor vehicles in the Diamond Cove premises, except for emergency and common transportation vehicles; and restricts traffic south of the Diamond Cove project and to the southerly pier consistent with the use of the Diamond Cove pier for transportation (copy enclosed). The March 1989 Agreement and amendment among Diamond Cove Associates, Maine Audubon Society, Conservation Law Foundation and Island Institute regarding Diamond Cove (copy enclosed) also contemplates little vehicular traffic from the new development to the south end of the Island.

commercial property except as provided in subparagraph (d) below" [which allows for City collection of solid waste and recyclables from certain apartment buildings and residential condominiums on or after January 1, 2007 under written agreement]. Section 12-16 of that Code defines a "commercial property" to mean: "any property upon which is situated a structure used for commercial or business purposes including, but not limited to, the following: (a) Apartment buildings containing ten (10) or more dwelling units; (b) Hotels, restaurants, warehouses; (c) Markets, bakeries, grocery stores, fruit stands; (d) Manufacturing or industrial; (e) Business offices; and (f) Condominiums." The proposed "hotelminium" units proposed here are being leased under common management, and so this is a commercial property -- a hotel -- that requires private solid waste collection and disposal arrangements.

(5) Further, Maine's Constitution is interpreted as containing a "public purpose doctrine" that prohibits the expenditure of public funds for a private purpose. Any use of public monies to store solid waste generated by the commercial hotelminium Inn at Diamond Cove project at a temporary storage facility licensed to the City, for transport of the waste from Island to the mainland and disposal by the City, would violate this doctrine.

(6) Finally, temporary storage of solid waste generated by the Inn at Diamond Cove project at the temporary storage facility licensed to the City by DIA was not contemplated when the City and DIA entered into a License for the storage of public works equipment and solid waste on DIA-owned property. As explained below, the current storage of waste generated by DCHA already is an issue; the addition of solid waste from this proposed commercial property is simply beyond the scope of the License and is beyond the ability of the property to handle.

Second, there already are significant issues with the temporary storage of solid waste at the property the City licenses from DIA. It is clear from the DEP orders and the City rezoning amendments cited above that DCHA is required to collect, transport and dispose of the residential solid waste generated by Diamond Cove. However, these orders and amendments are not being enforced, and DCHA now transports Diamond Cove residential solid waste to the DIA-owned and City-licensed lot for temporary storage. The DIA Island Development Committee soon will be scheduling a meeting with a City representative to remedy this situation.

As a result, in the three years since that License was signed, the amount of solid waste has increased significantly, and with it, the noise and odor that accompanies the handling of that solid waste. Before the License was executed, the cottage community's solid waste filled a dump truck for temporary storage, and recycling efforts reduced the amount of waste to be disposed; the solid waste now fills two garbage trucks, and the increased amount of solid waste storage generates an increased level of odor. The transient nature of the Diamond Cove population also has increased the amount of solid waste bottles to be disposed of, which are not shipped off for recycling, but are crushed by the City, generating increased noise levels. A neighbor who has been restoring a home on adjacent property has noticed the increase in odor and noise emanating from the temporary storage area over the last several years. Moreover, foul-smelling liquid has been seeping from trucks hauling solid waste and increased wear and

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tear on the gravel roads by solid waste-hauling trucks is evident. Cottage community residents note that the previously unnoticed raccoon population has now become a nuisance because of the greater amounts of solid waste, dragging refuse from the City truck onto private property.

Third, by copy of this letter, DIA wishes to make the City aware of the issues it has under the License regarding temporary storage of solid waste. DIA and the City currently are negotiating the terms of that License, which allows the City to use the DIA-owned property for temporary storage of solid waste until it can be transported to the barge landing for transportation to the mainland and disposal, and for storage of public works equipment, and DIA will be seeking to address these solid waste issues in that negotiation.

In sum, DIA does not generally oppose the proposed Inn at Diamond Cove application. DIA had raised objections before the City based upon transportation issues, and had not planned to raise solid waste storage and disposal as an issue until now, when the applicant apparently has changed course on its method of solid waste disposal. At the same, it also is apparent that the solid waste disposal method used by the existing Diamond Cove development fails to comply with the DEP orders and City rezoning amendment, and is not what DIA contemplated when it entered into a License with the city three years ago to allow for temporary storage of solid waste on DIA property. This is not some petty, groundless dispute between the cottage community and the Diamond Cove/Inn at Diamond Cove development. In the 1980s, after much consideration, DEP and the City issued permits, licenses, orders and approvals, the intent of which was that the Diamond Cove development not adversely affect the south Island cottage community. However, DEP and the City have failed to enforce the terms of those permits, licenses, orders and approvals, to the detriment of the cottage community. Now, the proposed Inn at Diamond Cove seeks to add to the problems caused by that failure.

Therefore, DIA objects to the applicant's proposal to use the City-operated temporary storage facility for the solid waste it will generate, and asks the DEP to instead require the applicant to handle on Diamond Cove property the collection, transportation and disposal of the solid waste it will generate; this waste should neither be stored on the City-licensed property nor transported from the State pier at the southern end of the Island. The central concept that runs through the State and local permits, licenses, orders and approvals for the existing Diamond Cove development is that Diamond Cove be its own self-sustaining development, separate and apart from the south end of the Island, so as not to adversely impact the south end of the Island. This concept should remain central in the review of the proposed Inn at Diamond Cove.

Thank you for your consideration of this matter.

Sincerely,


James N. Katsiaficas

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JNK:pal

Enclosures

cc: Gary C. Wood, Corporation Counsel, City of Portland
Michael J. Bobinski, Director of Public Services, City of Portland
Richard Knowland, Senior Planner, City of Portland
Peggy Bensinger, Assistant Attorney General
Ronald Ward, Esq., Drummond Woodsum
Michael Harris, Chair, Island Development Committee, DIA

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June 30, 2009
Hand-Delivered

DOUGLAS S. CARR
PHILIP C. HUNT
JOHN S. LUTON
PEGGY C. PICHFFE
MELISSA HANLEY MURPHY
JOHNA CIRALDO
JOHNA HOBSON
JAMES N. KATSAKIS
TIPOTHY P. REUBEN
J. GORDON SCANNELL, JR.
ROD W. BOFFA
MARK P. SNOW
WILLIAM J. SHIBBS
DAVID S. HICGINHILL
PAUL D. METROPOLU
MORTIMER J. POGGSEN
RANDY J. CRESWELL
JENNIFER H. PINCUS
DAWN M. HARMON
CHRISTOPHER M. DARGIE
ANTHONY J. MATHIAS
STEPHANIE A. WELLES
PETER J. MORGON-OL
LAURENCE H. STEIN
KEITH J. DUNLAP
SARAH M. POHIN

OF COUNSEL

THOMAS SOULTES
OWEN W. WELLS
ANDREW A. CASOLI
JULIANNE C. RAY

Ms. Marybeth Richardson
Maine Department of Environmental Protection
312 Canco Road
Portland, ME 04103

Re: The Inn at Diamond Cove, Great Diamond Island, Portland, Maine, Draft Order,
Application for Amendment to Site Location of Development Permit # L-013160-L3-
AB-B

Dear Marybeth:

This Firm represents the Diamond Island Association (DIA), an association of property owners on the south side of Great Diamond Island. We are writing to comment upon the Draft Order issued on June 23, 2009 regarding the proposed Inn at Diamond Cove. We appreciate the changes that the Department has required in the application for this project, but have two major concerns that we seek to have specifically addressed in the terms of the Order.

One concern is that the solid waste generated by the proposed Inn at Diamond Cove be disposed of privately. As City of Portland Associate Corporation Counsel Mary E. Costigan observed in her June 9, 2009 letter to you, the City's rezoning amendment for this project provides:

6. Disposal of solid waste. All solid waste generated on the Premises shall be collected and disposed of **privately**, on the mainland, with temporary storage of such waste being handled within the building and disposed of in accordance with all applicable regulations, codes and laws; or if, in the City's opinion, it would not create an unreasonable burden thereon, at a municipally-operated island solid waste disposal facility. (emphasis added)

As Attorney Costigan's letter states, the City has no intention to allow solid waste generated by the proposed Inn to be disposed of at a municipally-operated island solid waste disposal facility, and so requires it to be disposed of **privately**. That letter also requested that the applicant be required to handle solid waste in